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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 213

UNITED STATES OF AMERICA, PETITIONER,

vs.

ETTORE ZUCCA, ALSO KNOWN AS MARIO SARNI, ALSO KNOWN AS ETTORE SARNI ZUCCA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FILED JULY 7, 1955

CERTIORARI GRANTED OCTOBER 10, 1955

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

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1 IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Appendix to Appellant's Brief

United States District Court, Southern District of New York

Civ. 93-38

Basis of Action: Cancel certificate of naturalization

UNITED STATES OF AMERICA

vs.

ETTORE ZUCCA, also known as Mario Sarni, also known as Ettore Sarni Zucca

EXCERPTS FROM DOCKET ENTRIES

For Plaintiff:

U. S. ATTORNEY

For Defendant:

JUDD & GURFEIN, 655 Madison Ave. (21)

Date	Filings—Proceedings
May 4-54.	Filed Complaint and Issued Summons.
May 11-54.	Filed summons and return. served deft. 5-7-54.
June 29-54.	Filed Stip. & Order extending time to answer to 8-2-54, Edelstein, *J.*
2 July 20-54.	Filed Stip. & Order extending time to answer to 8-10-54.
Aug. 10-54.	Filed notice of motion to dismiss complaint, etc., ret. 8-24-54.

* * * *

Nov. 17-54. Filed opinion #21,500 Complaint dismiss unless, etc. (see opinion) Settle order, Palmieri, *J.*

Dec. 6-54. Filed order dismissing complaint for failure to file affdvt. showing good cause for institution of present proceedings, and for reinstatement of complaint provided affdvt. of good cause be filed within 60 days, Palmieri, *J.* Mailed notice of entry 12-7-54

Feb. 4-55. Filed Notice of Appeal and on 2-8-55 mailed copy to Judd & Gurfein

Feb. 14-55. Filed order dismissing complaint without prejudice to Govt's right to institute action to denaturalize deft. upon filing affdvt. of good cause, Palmieri, *J.* Mailed notice of entry 2-15-55

Feb. 18-55. Filed Notice of Appeal and on 2-21-55 mailed copy to Judd & Gurfein

COMPLAINT FILED MAY 4, 1954

* * * * *

The plaintiff, United States of America, by its attorney J. Edward Lumbard, United States Attorney for the Southern District of New York, for its complaint herein alleges:

1. This is an action under Section 340(a) of the Immigration and Nationality Act, Public Law No. 414, 82d Congress, 2d Session

2. At all times hereinafter mentioned, the plaintiff was and now is a sovereign power.

3. Defendant resides at 1220 Commonwealth Avenue, Borough of Bronx, City, State and Southern District of New York, within the jurisdiction of this Court.

4. On or about September 28, 1942, defendant filed a petition for naturalization in the United States District Court for the Southern District of New York at New York, N.Y., and was admitted to citizenship by that Court on January 4, 1944, as Ettore Zucca, receiving Certificate of Naturalization No. 5588188.

5. In the proceedings which led to the defendant's naturalization, the defendant stated under oath, among other things, as follows:

[2] (a) On October 7, 1940, in connection with his registration as an alien pursuant to the Alien Registration Act of 1940, the defendant stated:

4

"10. I am, or have been within the past 5 years, or intend to be engaged in the following activities: In addition to other information, list memberships or activities in clubs, organizations or societies: *Business Agent & Organizer for Waiters & Waitresses Union, Local #1 A. F. L. from September 1937 to May 1939. I am now member of same. Also have been member of Metropole Sporting Club.*"

* * * * *

"15. Within the past 5 years I *have not* been affiliated with or active in (a member of, official of, a worker for) organizations devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government."

(b) On September 28, 1942, in his preliminary naturalization examination alleged: that he did not belong to and was not associated with any organization which teaches or advocates the overthrow of existing government in this country, and that the only organization to which he belonged was the Waiters Union.

and that he had formerly belonged only to the Metropole Sporting Club.

(c) On September 28, 194-, in testifying before a naturalization examiner and in executing his petition for naturalization, alleged under oath:

"It is my intention in good faith to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty of which I am at this time a subject or citizen . . ."

"I am not; and have not been for the period of at least 10 years immediately preceding the date of this petition . . . a believer in the unlawful damage, injury, or destruction [3] of property, or sabotage; nor a disbeliever in or opposed to organized government, nor a member of or affiliated with any organization or body of persons teaching disbelief in or opposition to organized government . . . I am, and have been during all the periods required by law, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States."

6. That all of the aforesaid statements of the said defendant as set forth in paragraph 5 of this complaint were false and untrue as more particularly appears hereinafter.

7. That the said defendant was a member of the Communist Party of the United States, including the Workers Communist Party and other organizations affiliated with or controlled by the Communist Party of the United States from 1925 to 1947.

8. That the Communist Party of the United States was an organization which, during the period of said defendant's membership therein:

(a) Advised, advocated or taught the overthrow by force or violence of the government of the United States;

(b) Advised, advocated or taught the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers of the government of the United States because of his or their official character;

(c) Advised, advocated or taught the unlawful damage, injury or destruction of property;

(d) Advised, advocated or taught sabotage;

(e) Wrote, circulated, distributed, printed, published or displayed, or caused to be written, circulated, distributed, printed, published or displayed, or had in its possession for the purpose of circulation, distribution, publication, issuance or display, written and printed matter which advised, advocated or taught

the performance of the acts described in the subparagraphs immediately preceding and numbered a, b, c and d.

[4] (f) Promoted, influenced and advanced the political activities, public relations and public policy of the Union of Soviet Socialist Republics.

9. That at all of the times above mentioned the Communist Party of the United States was a section of the Communist Internationale, an international organization whose principal officers were citizens or subjects of foreign countries and the principal offices of which were situated in Moscow, in the Union of Soviet Socialist Republics; that decisions made by such organizations were binding upon other Communist Parties, including the Communist Party of the United States and the individual members thereof, whether such decisions were contrary to the laws of the United States or not.

7 10. That the naturalization of the said defendant was illegally procured in that his naturalization was prohibited by Section 305 of the Nationality Act of 1940, since he had been a member of the Communist Party within the period of 10 years immediately preceding the filing of his petition, such organization having engaged in activities proscribed by the statute.

11. That the naturalization of the defendant Ettore Zucca was procured by concealment of material facts in that:

(a) The defendant concealed the facts relating to his membership in the Communist Party and its affiliated organizations;

(b) The defendant did not disclose that he was not in a position to establish that he was a person of good moral character during the period required by law, having; among other things, made false statements under oath in his petition for naturalization as more specifically set forth hereinabove;

(c) The defendant was not attached to the principles of the Constitution of the United States of America and was not well disposed to the good order and happiness of the United States of America during [5] the period required by law inasmuch as he had been a member of the Communist Party of the United States of America and other organizations affiliated with such Communist Party, which organizations had, as the defendant well knew, engaged in activities in violation of the laws of, and detrimental to the interests of the United States of America, as more particularly set forth above; and

8 the defendant personally subscribed to, endorsed, advocated and participated in such activities;

(d) The defendant did not intend in good faith to support the Constitution of the United States, and he further did not

intend to renounce and abjure absolutely and entirely all allegiance and fidelity to all other foreign states and sovereignties, and to bear true faith and allegiance solely to the United States, but rather intended to, and did retain allegiance to the Communist Internationale and the Union of Soviet Socialist Republics.

12. The naturalization of the defendant Ettore Zucca was procured by wilful misrepresentations in that the said defendant at the time he applied and at the time he obtained naturalization:

(a) The defendant wilfully and intentionally made false statements that he was attached to the principles of the Constitution and well disposed to the good order and happiness of the United States during the period required by law, although he had been a member of and active in the affairs of the Communist Party of the United States of America and other organizations affiliated with such Communist Party which, to the defendant's knowledge, had engaged in activities in violation of the laws of, and detrimental to the interests of the United States of America, as more particularly set forth above; and the defendant personally subscribed to, endorsed, advocated and participated in such activities;

9 (b) The defendant wilfully and intentionally made false statements that he intended to support and defend the Constitution and laws of the United States and to bear true faith and allegiance to the United States of America;

(c) The defendant at the time he alleged, under oath, that he intended to renounce absolutely [6] and forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, as more particularly set forth in paragraph 5 of this complaint, did not, in fact, so intend, but rather intended to retain allegiance and fidelity to the Communist Internationale and the Union of Soviet Socialist Republics.

13. That the said defendant deliberately and intentionally made false statements in the proceedings leading up to his naturalization, as set forth in the preceding paragraphs, in order to prevent the making of a full and proper investigation of his qualifications for citizenship; to conceal his lack of attachment to the principles of the Constitution; to induce the Immigration and Naturalization Service to make an unconditional recommendation to the court that his petition be granted; to preclude inquiry by the court concerning his qualifications for citizenship; and to procure naturalization in violation of law.

14. That good cause exists for the institution of this suit and the plaintiff is entitled to have the order of the court admitting the defendant to citizenship of the United States revoked and set aside, and to have the certificate of naturalization, previously issued to the defendant, cancelled on the grounds that such order and certificate of naturalization were procured illegally and by concealment of material facts and wilful representations.

WHEREFORE, the plaintiff demands judgment (a) revoking and setting aside the order admitting the defendant to citizenship; (b) cancelling his certificate of naturalization; (c) directing the defendant to surrender such certificate of naturalization to the Commissioner of [7] Immigration and Naturalization; (d) declaring that the defendant Ettore Zucca is not and never was a duly naturalized citizen of the United States and that he is not entitled to any of the rights and privileges of such citizenship; and (e) forever restraining the defendant from claiming any rights, privileges, benefits or advantages under such order or certificate.

Dated: New York, N.Y., April 29, 1954.

J. EDWARD LUMBARD,
United States Attorney for the
Southern District of New York,
Attorney for Plaintiff.

by George C. Mantzoros,
Assistant United States Attorney,
Office and Post Office Address,
United States Court House,
Foley Square,
New York 7, N.Y.

10a VERIFICATION OF COMPLAINT.

State of New York, County of New York, Southern District of New York, ss.:

GEORGE C. MANTZOROS, being duly sworn deposes and says that he is an Assistant United States Attorney for the Southern District of New York, and as such has charge of the above entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true; that the reason this verification is made by him and not by the plaintiff is that the plaintiff is a corporation sovereign; that the sources of

his information and the grounds of his belief are the records which are on file in his office.

GEORGE C. MANTZOROS,
Assistant United States Attorney

Sworn to before me this 29th day of April, 1954.

DANIEL TANNENBAUM
Notary Public, State of New York
Qualified in Kings County
No. 24-3930200
Commission Expires March 30, 1955

10b In United States District Court

[Title omitted]

SUMMONS—May 4, 1954

TO THE ABOVE-NAMED DEFENDANT:

You are hereby summoned and required to serve upon J. EDWARD LUMBARD, United States Attorney for the Southern District of New York, plaintiff's attorney, whose address is United States Court House, Foley Square, New York, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

WILLIAM V. CONNELL,
Clerk of Court.
JAMES E. VALECHE,
Deputy Clerk.

(Seal of the U. S. District Court)

Dated May 4, 1954

(This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.)

10c In United States District Court

[Title omitted]

AFFIDAVIT OF GEORGE C. MANTZOROS

State of New York,
County of New York,
Southern District of New York, ss.:

GEORGE C. MANTZOROS, being duly sworn, deposes and says as follows:

That he is one of the Assistant United States Attorneys on the staff of J. Edward Lumbard, United States Attorney for the Southern District of New York in charge of the above-entitled case.

That the only knowledge or information which he has in this case has been obtained through files turned over to him for use in preparation of the complaint.

That he has no personal knowledge of any of the facts herein and is not a prospective witness.

That on information and belief his superior, the said J. Edward Lumbard likewise has no personal knowledge of any of the facts herein and is not a prospective witness.

That he has carefully reviewed the files in this case and finds nothing therein which would indicate any special or unusual circumstances requiring the production of the documents requested by the defendant in his notice to take depositions, dated July 8, 1954.

10d That many of the documents in said files are privileged because of their confidential nature.

GEORGE C. MANTZOROS.

Sworn to before me this 22nd day of July, 1954.

CHARLES M. LEE
Charles M. Lee

Notary Public, State of New York

No. 03-228950
Qualified in Bronx County
Cert. Filed with Clerks of Bronx and N. Y. Counties and Register's

Term Expires March 30, 1955

11 In United States District Court

NOTICE OF MOTION TO DISMISS COMPLAINT OR TO MAKE MORE DEFINITE AND CERTAIN AND TO STRIKE CERTAIN ALLEGATIONS AS IRRELEVANT AND TO SEPARATELY STATE AND NUMBER

SIRS:

PLEASE TAKE NOTICE, that upon the complaint herein, the affidavit of verification thereof by George C. Mantzoros, sworn to April 29, 1954, the affidavit of George C. Mantzoros, sworn to July 22, 1954, and all proceedings had herein, the undersigned will move this Court at a stated term thereof for the hearing of motions to be held at the United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 24th day of August, 1954, at 10:00 o'clock in the forenoon thereof, or as soon thereafter as counsel may be heard, for an order

1. Dismissing the complaint:

(a) for failure to comply with Rule 8(a) and (c) of the Rules of Civil Procedure; and

(b) for failure to comply with Rule 9(b) of the Rules of Civil Procedure; and

(c) for failure to comply with Rule 10(b) of the Rules of Civil Procedures; and

(d) for failure to file or serve on the defendant an affidavit showing good cause for the institution of the present
12 proceedings as required by the Immigration and Nationality Act of 1952 (8 U. S. C. A., Sec. 1451);

or if the motion to dismiss the complaint shall not be granted,

2. Requiring the plaintiff, pursuant to Rule 12(e) of the Rules of Civil Procedure, to make a more definite statement [23] respecting

(a) the allegation in paragraph 6 of the complaint "that all of the aforesaid statements of said defendant as set forth in paragraph 5 of this complaint were false and untrue as more particularly appears hereinafter."

(b) the allegation in paragraph 7 of the complaint "that the said defendant was a member of the Communist Party in the United States, including the Workers Communist Party and other organizations affiliated with or controlled by the Communist Party of the United States from 1925 to 1947;"

(c) the allegation in paragraph 11(b) of the complaint that: "the defendant did not disclose that he was not in a position

to establish that he was a person of good moral character during the period required by law, having, among other things, made false statements under oath in his petition for naturalization as more specifically set forth hereinabove;"

13 (d) the allegation in paragraph 11(c) of the complaint that: "he has been a member of the Communist Party of the United States of America and other organizations affiliated with such Communist Party, which organizations had, as defendant well knew, engaged in activities in violation of the laws of, and detrimental to, the interests of the United States of America, as more particularly set forth above; and did personally subscribe to, endorsed, advocated and participated in such activities;"

(e) the allegation in paragraph 12(a) of the complaint that: "he had been a member of and active in the affairs of the Communist Party of the United States of America and other organizations affiliated with such Communist Party which, to the defendant's knowledge, had engaged in activities in violation of the laws of, and detrimental to, the interests of the United States of America, as more particularly set forth above; and the defendant personally subscribed to, endorsed, advocated and participated in such activities;" and

(f) the allegation in paragraph 13 of the complaint that: "the said defendant deliberately and intentionally made false statements in the proceedings leading up to naturalization as set forth in the preceding paragraphs";

14 [24] ● Striking out as immaterial and redundant, pursuant to Rule 12(f) of the Rules of Civil Procedure, so much of the allegations of paragraph 7 of the complaint as relates to a period prior to January 4, 1934, or subsequent to January 4, 1944;

4. Directing plaintiff, pursuant to Rule 10(b) of the Rules of Civil Procedure, to separately state and number the allegations in paragraph 11(c) and 12(a) of the complaint and the claims based upon alleged violation of the Immigration and Nationality Act of 1952, and the Nationality Act of 1940; and,

5. For such other and further relief as may be just and proper.

Dated: New York, N. Y.
August 9, 1954.

Yours, etc.

JUDD & GURFEIN
Attorneys for Defendant
By /s/ ORRIN G. JUDD
A Member of the Firm
Office and P. O. Address
655 Madison Avenue
New York 21, N. Y.

To: J. EDWARD LUMBARD,
United States Attorney for the
Southern District of New York,
Attorney for Plaintiff,
United States Court House,
Foley Square,
New York, New York.

15 In United States District Court

OPINION OF PALMIERI, D. J.

* * * *

APPEARANCES:

Hon. J. Edward Lumbard
United States Attorney for the
Southern District of New York
Attorney for United States

George C. Mantzoros, Esq.,
Assistant United States Attorney
of Counsel.

Judd & Gurfein, Esqs.
655 Madison Avenue
New York 21, N. Y.
Attorneys for Defendant,

Orrin Judd, Esq.,
of Counsel.

OPINION

PALMIERI, D. J.

The defendant was naturalized by this Court on January 4, 1944. The United States now brings this action under section 340(a) of the Immigration and Nationality Act of 1952, [32] 66 Stat. 163, 260, 8 U. S. C. § 1451(a) (1952 ed.), to revoke and set aside the order admitting the defendant to citizenship and to cancel the defendant's certificate of naturalization on the grounds that the defendant's naturalization was illegally procured and that the defendant concealed material facts and wilfully
16 misrepresented others in the course of the proceedings leading to his naturalization.

The defendant has moved that the complaint be dismissed because of (1) the Government's alleged failure to draft an adequate complaint and (2) the Government's failure to file an affidavit showing good cause for the institution of the instant proceeding.

The defendant argues that the Government's complaint is pro-

cedurally inadequate because it allegedly fails to comply with Rules 8(a), 8(c) (sic), 9(b), and 10(b) of the Rules of Civil Procedure. These Rules deal with the general rules of pleading, the particularity with which fraud should be pleaded, and the form of pleadings. Defendant asserts that the complaint fails to give fair notice of the Government's claim, but it is clear that this assertion is without merit. The complaint alleges that the defendant's naturalization was illegally procured in that it was prohibited by section 305 of the Nationality Act of 1940 and that the defendant concealed material facts and misrepresented others in the course of the proceedings leading to his naturalization. It sets forth the alleged act which made the procurement of [33] defendant's naturalization illegal and the allegedly concealed and misrepresented facts with what may well be unnecessary specificity for a civil complaint.

In view of this, it would appear that the defendant is merely saying that a better complaint should have been drawn. However, it is not the function of this court to pass on the artistic merits of pleadings. See *Dioguardi* v. *Durning*, 139 F. 2d 774 (2d Cir. 1944). The complaint not only gives the defendant fair notice of the Government's claim but it also informs him of the alleged facts upon which that claim is based. The motion to dismiss the com-
17 plaint because it is procedurally inadequate is therefore denied.

The defendant has also moved that the complaint be dismissed because of the Government's failure to file an affidavit showing good cause for the institution of this proceeding. He contends that the filing of such an affidavit is required by section 340(a), 8 U. S. C. § 1451(a) (1952 ed.), which reads:

> "It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings . . . for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization. . . ."

Section 340(a) is derived from section 338(a) of the Nationality Act of 1940, 54 Stat. 1137, 1158 which was derived from section 15 of the Act of June 29, 1906, 34 Stat. 596, 601 (1906), the first enactment providing for denaturalization on [34] the grounds of fraud or illegal procurement. See S. Rept. No. 1137, 82d Cong., 2d Sess. 45 (1952); S. Rept. No. 1515, 81st Cong., 2d Sess. 755 (1950). The 1906 Act contained the language:

> "it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings . . ."

to denaturalize a person on the grounds of fraud or illegal procurement; and the quoted language was incorporated into the 1940 and 1952 acts without Congressional comment.

The Government contends that the source of a United
18 States Attorney's power to institute civil denaturalization actions is the

> "duty of each United States attorney, within his district, to . . . prosecute . . . for the government, all civil actions, suits or proceedings in which the United States is concerned. . . ."

28 U. S. C. § 507(a)(2) (1952 ed.). The position taken by the Government is that United States Attorneys had the power to institute civil denaturalization actions before the passage of the Act of June 29, 1906, and that the 1906 Act and its later re-enactments did not circumscribe this power. See H. R. Doc. No. 46, App. D, 59th Cong., 1st Sess. 76, 78 (1905); *Bindczyck* v. *Finucane*, 342 U. S. 76, 79 n. 3 (1951); *United States* v. *Mansour*, 170 Fed. 671, 675 (S. D. N. Y. 1908); *United States* v. *Norsch*, 42 Fed. 417 (C. C. E. D. Mo. 1890). [35] The Government supports its position by showing that Congress was well aware that United States Attorneys were conducting civil denaturalization actions when it enacted the 1906 Act and did not indicate that it wished to curtail their power to do so. See H. R. Rept. No. 1789, 59th Cong., 1st Sess. 2 (1906); statement of Congressman Bonynge, manager of the bill, 40 Cong. Rec. 3640 (1906); statement of Congressman Hayes, 40 Cong. Rec. 7043 (1906). From this the Government concludes that in providing that

> "it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor . . ."

to institute denaturalization proceedings, Congress merely imposed a requirement that United States Attorneys institute such proceedings whenever they were furnished with an affidavit of good cause. It did not intend, the argument runs, that a United
19 States Attorney should be powerless to institute proceedings if he had not been furnished with an affidavit.

Although it can be assumed that the civil denaturalization actions initiated by the Government prior to the passage of the Act of June 29, 1906 were valid, see *Johannessen* v. *United States*, 225 U. S. 227, 240 (1912); S. Rept. No. 1515, 81st Cong. 2d Sess. 754 (1950), I cannot agree with the Government's conclusions. The legislative history of the Act of June 29, 1906 indicates (1) that the procedure first outlined in section 15 of that Act, and now set forth in section 340 of the Immigration and Nationality Act of 1952, is

the [36] only procedure for denaturalizing a person on the grounds of fraud or illegal procurement, and (2) that this procedure requires that before a United States Attorney can institute a civil denaturalization action he must be furnished with an affidavit of good cause.

The Government's premise that the legislative history of the 1906 Act does not indicate that Congress intended to restrict the theretofore exercised power of United States Attorneys to institute civil denaturalization actions is, in my opinion, invalid. The Government apparently assumes that Congress intended the procedure which is set forth in section 15 of the 1906 Act to be an alternative to the procedure in use before the Act took effect. But section 15 and its legislative history furnish abundant evidence that Congress intended that the procedure set forth in that section should be followed whenever civil denaturalization actions were thereafter initiated.

In addition to referring to the affidavit of good cause section 15 provided that a defendant in a denaturalization proceeding should have 60 days personal notice in which to answer the complaint unless he was absent from the United States or from the district in which he had last resided. And, after the bill that later became the 1906 Act was introduced, Section 15 was amended to provide that a denaturalization action could only be instituted in a court in the judicial [37] district in which the naturalized citizen resided. See statement of Congressman Bonynge, manager of the bill, 40 Cong. Rec. 7874 (1906).

The fact that Congress inserted these requirements for the protection of naturalized citizens in the 1906 Act is inconsistent with the Government's position. It indicates that in enacting section 15 of that Act Congress did intend to limit the theretofore exercised power of United States Attorneys to institute civil denaturalization actions. For if, as the Government contends, the power of United States Attorneys to institute such actions is derived from 28 U. S. C. §507(a)(2) (1952 ed.), which empowers United States Attorneys to prosecute all civil actions in which the Government is concerned, and is not restricted by the provisions of section 340 of the Immigration and Nationality Act of 1952 (a reenactment of section 15 of the 1906 Act so far as is material to the decision of the instant motion), the provisions which safeguard naturalized citizens are effective only if United States Attorneys choose to give them effect by proceeding under section 340 instead of under their general power to prosecute all civil actions for the Government. An interpretation which gives such cavalier treatment to important safeguards insisted on by Congress cannot be sustained. I therefore conclude that the power of United States Attorneys to institute civil denaturalization actions is derived from [38] and limited by

the provisions of section 340 of the Immigration and Nationality Act of 1952. *Cf. Bindczyck* v. *Finucane*, 342 U. S. 76, 81-84 (1951); *Volpe* v. *Jordan*, 161 F. 2d 390, 395 (7th Cir. 1947).

This determination still leaves open the following questions:

(1) Whether section 340(a) requires that a United States Attorney be furnished with an affidavit of good cause before he can institute a denaturalization proceeding; and

(2) if such an affidavit is required, whether a United States Attorney must file it with the court when instituting a denaturalization proceeding.

In support of its contention that United States Attorneys may institute denaturalization proceedings even though they have not been furnished with affidavits of good cause the Government relies on cases which hold or contain dicta to the effect that a United States Attorney can "institute proceedings of this character sua sponte whenever he ha(s) reason to believe that the law ha(s) been violated . . ." *Schwinn* v. *United States*, 112 F. 2d 74, 75, 76 (9th Cir.), aff'd "on the sole ground that the certificate of citizenship was illegally procured," 311 U. S. 616 (1940); *United States* v. *Jerome*, 115 F. Supp. 818 (S. D. N. Y. 1953); [39] *United States* v. *Lustig*, 110 F. Supp. 806 (S. D. N. Y. 1953); *Cf. United States* v. *Tuteur*, 215 F. 2d 415 (7th Cir. 1954); *United States* v. *Knight*, 291 Fed. 129 (D. C. Mont. 1923); *United States* v. *Eeles*, 227 Fed. 189 (N. D. Cal. 1915).

To the extent that these cases are predicated upon the view that United States Attorneys possess the power to initiate civil denaturalization actions unfettered by the provisions of section 340, the preceding portion of this opinion shows why I cannot agree with them.

22 Moreover, it does not appear that any of the cases cited by the Government considered the legislative history of section 340 which has been referred to above, and only two referred to *Bindczyck* v. *Finucane*, 342 U.S. 76 (1951). One distinguished it on the ground that it dealt with denaturalization proceedings instituted in a state rather than a federal court. *See United States* v. *Jerome*, 115 F. Supp. 818 (S. D. N. Y. 1953). With deference, however, I believe that this distinction does not give sufficient weight to the reasoning of the *Bindczyck* case. In that case the Court said:

> "In the light of . . . (the legislative history of section 15 of the 1906 Act) we cannot escape the conclusion that in its detailed provisions for revoking a naturalization because of fraud or illegal procurement not appearing on the face of the record,

Congress formulated a self- [40] contained, exclusive procedure. With a view to protecting the Government against fraud while safeguarding citizenship from abrogation except by a clearly defined procedure, Congress insisted on the detailed, explicit provisions of §15. . . .

"Between them, these two sections, §11 and §15, provided a complete and exclusive framework for safeguarding citizenship against unqualified applicants. . . . [I]f citizenship was granted, it was to be proof against attacks for fraud or illegal procurement based on evidence outside the record, except through the proceedings prescribed in §15. The congressional scheme, providing carefully for the representation of the Government's interest before the grant of citizenship and a detailed, safeguarded procedure for attacking the decree on evidence of fraud outside the record, covers the whole ground. . . ." pp. 83-84.

23 I believe that the "self contained, exclusive procedure" must be followed in denaturalization proceedings instituted in federal courts as well as those instituted in state courts.

The other, *United States* v. *Lustig, supra*, considered itself bound by the Supreme Court's affirmance of the lower court's disposition of the *Schwinn* case, although it stated that "it would seem, the reasoning of the Court of Appeals in the *Schwinn* case has been repudiated" by the Supreme Court's reasoning in the *Bindczyck* case. See p. 808 n. 3. It has already been pointed out that the Supreme Court affirmed *Schwinn* v. *United States*, 112 F. 2d 74 (9th Cir. 1940), [41] "on the sole ground that the certificate of citizenship was illegally procured." See 311 U.S. 616 (1940). And examination of the briefs submitted to the Supreme Court indicates that the issue of the power of a United States Attorney to institute a civil denaturalization action when he has not been furnished with an affidavit of good cause, was not raised before that Court. Therefore, I cannot regard the Supreme Court's affirmance of the lower court's disposition of the *Schwinn* case as being dispositive of this issue.

Nor can I agree with the cases cited by the Government if they are interpreted as holding only that section 340(a) does not require that a United States Attorney be furnished with an affidavit of good cause before he can institute a denaturalization proceeding. This opinion has already shown that section 340(a) is derived from section 15 of the Act of June 29, 1906 and is similar to that section in all respects that are material to the decision of the instant motion. Section 15 of the 1906 Act was itself derived from section 34 of a proposed uniform naturalization law drafted by two members

of the Commission on Naturalization appointed by President
24 Theodore Roosevelt. It provided:

> "The United States shall have the power to institute proceedings . . . for the purpose of setting aside and canceling the certificate of citizenship on the [42] ground of fraud or on the ground that such certificate . . . was illegally issued . . ." H. R. Doc. No. 46, App. F, 59th Cong., 1st Sess. 106 (1906).

It will be noted that this draft did not mention an affidavit of good cause. But when the bill which later became the 1906 Act was reported out of committee the committee report said that an important feature of the bill was that

> "(p)ower is given to the United States, *upon affidavit of any credible person*, to institute proceedings to cancel any certificate of citizenship which may have been procured through fraud or otherwise illegally obtained."

See H. R. Rept. No. 1789, 59th Cong., 1st Sess. 5-6 (1906) (emphasis added); and statement of Congressman Bonynge, 40 Cong. Rec. 7874 (1906). Since it appears that Congress altered the draft provision to refer to an affidavit of good cause, it can be assumed that Congress considered the affidavit significant and intended to condition the power of the United States to institute denaturalization proceedings upon the furnishing of such an affidavit to a United States Attorney.

This view of the legislative history of section 15 of the 1906 Act is supported by a contemporaneous administrative interpretation of that section. In a letter dated March 26, 1907 the Attorney General of the United States advised the Secretary of
25 Commerce and Labor, who was then charged with the responsibility of administering the immigration and naturalization laws, as follows:

> "The Honorable
>
> The Secretary of Commerce and Labor.
>
> Sir:
>
> The Department has the honor to acknowledge receipt of your letter of March 18th in which you ask whether the filing of an affidavit is necessary to give a United States attorney authority to institute proceedings in any court for the cancellation of a naturalization certificate. It appears to the Department that this is the case. The object of the provision undoubtedly is to protect holders of certificates from annoyance and attorneys from unnecessary labor as the result of mere complaints by individuals unable to produce evidence and unwilling to assume

the responsibility therefor, as suggested in your letter; but it also seems clear to me that Congress has seen fit to prescribe the method by which this protection to those holding naturalization certificates is to be enforced.

I am, therefore, of opinion that before any United States attorney is authorized to institute proceedings for the cancellation of a naturalization certificate he should be furnished with a proper affidavit on which the proceedings may be based.

Respectfully,

CHARLES J. BONAPARTE,
Attorney General."

26 See unpublished opinion Att'y Gen., March 26, 1907, National Archives; *Cohen* v. *United States*, 38 App. D. C. 123 (D. C. Cir. 1912); Van Dyne, A Treatise on the Law of Naturalization of the United States 138 (1907).

Because of the legislative history of the denaturalization provision and the weight to be given to a contemporaneous administrative interpretation of a statute by the officer charged with its enforcement, see *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378 (1931), I hold that before a United States Attorney may institute a denaturalization proceeding he must be furnished with an affidavit of good cause.

The final question for decision is whether a United States Attorney must file the affidavit of good cause that has been furnished to him with the court when instituting a denaturalization proceeding. I believe that he must do so. The instant proceeding is of the most serious import. "Denaturalization . . . may result in the loss 'of all that makes life worth living.'" See *Knauer* v. *United States*, 328 U. S. 654, 659 (1946). It is often a preliminary step to deportation with its attendant rending of the social and familial roots and ties that have become the life of the deportee. Indeed, the mere initiation of a denaturalization proceeding may have serious adverse consequences for the naturalized citizen.

Thus, there can be no doubt that Congress had good reason to surround denaturalization actions with the safeguards prescribed by section 15 of the 1906 Act and its re-enactments, one of which is the affidavit of good cause. But, the protection afforded by the requirement of an affidavit of good cause would be seriously impaired if the defendant in a denaturalization action could not examine it and test its sufficiency by motion before trial.

27 *Cohen* v. *United States*, 38 App. D. C. 123 (D. C. Cir. 1912); *United States* v. *Richmond*, 17 F. 2d 28 (3d Cir. 1927); *United States* v. *Salomon*, 231 Fed. 928 (5th Cir. 1916); unpublished opinion of Judge Ryan in *United States* v. *Candela*, Civil No. 93-308 (S. D. N. Y. October 14, 1954).

Since the absence of an affidavit of good cause in the instant case deprives the defendant of a protection which Congress has afforded him, the complaint is dismissed unless the Government files such an affidavit within 15 days. My decision makes it unnecessary for me to decide certain procedural questions posed by the defendant's alternative motions. However, I am prepared to deal with them should the future course of this action warrant it.

Settle order on notice.

November 16, 1954.

EDMUND L. PALMIERI,
U. S. D. J.

In United States District Court

ORDER OF DECEMBER 6, 1954

An action having been commenced by the United States under Section 340(a) of the Immigration and Nationality Act of 1952, 8 U. S. C. Sec. 1451(a) by service on the defendant of a summons and verified complaint to revoke and set aside the order admitting the defendant to citizenship by naturalization on the grounds that the defendant's naturalization was illegally procured and the
28 defendant concealed material facts and wilfully misrepresented others in the course of the proceedings leading to his naturalization and the defendant having moved this Court by notice of motion dated August 9, 1954 for an order:—

1. Dismissing the complaint—

(a) for failure to comply with Rule 8(a) and (e) of the Rules of Civil Procedure; and

(b) for failure to comply with Rule 9(b) of the Rules of Civil Procedure; and

(c) for failure to comply with Rule 10(b) of the Rules of Civil Procedure; and

(d) for failure to file or serve on the defendant an affidavit showing good cause for the institution of the present proceedings as required by the Immigration and Nationality Act of 1952 (8 U. S. C. A. § 1451);

or if the said motion to dismiss the complaint were not granted;

2. Requiring the plaintiff, pursuant to Rule 12(e) of the Rules of Civil Procedure, to make a more definite statement respecting certain allegations in paragraphs 6, 7, 11(b), (c), 12(a) and 13 of the complaint, as set forth in said motion;

3. Striking out as immaterial and redundant, pursuant to Rule

12(f) of the Rules of Civil Procedure, so much of the allegations of paragraph 7 of the complaint as relates to a period prior to January 4, 1934, or subsequent to January 4, 1944;

29 4. Directing plaintiff, pursuant to Rule 10(b) of the Rules of Civil Procedure, to separately state and number the allegations in paragraphs 11(c) and 12(a) of the complaint and the claims based upon alleged violation of the Immigration and Nationality Act of 1952, and Nationality Act of 1940; and

5. For such other and further relief as may be just and proper.

And said motion having regularly come on to be heard before me on August 24, 1954, in the United States Court House, Foley Square, Borough of Manhattan, City and State of New York, and the defendant having appeared by his attorneys, Judd & Gurfein, Esqs., Orrin G. Judd, Esq., of counsel, and plaintiff having appeared in opposition thereto by Hon. J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for the United States, George C. Mantzoros, Esq., Assistant United States Attorney, of counsel,

Now (on reading the summons and complaint and the affidavit of George C. Mantzoros, Assistant United States Attorney, sworn to April 29, 1954, verifying said complaint, defendant's Notice of Motion dated August 9, 1954, the affidavit of George C. Mantzoros, sworn to July 22, 1954, briefs filed on behalf of defendant in support of said motion and the briefs filed by plaintiff in opposition to said motion, and on all the proceedings and papers heretofore had and filed herein, and due deliberation having been had, and upon filing the decision of the Court, it is

ORDERED, that the motion to dismiss the complaint for failure of the United States to comply with Rules 8(a) and (e), 30 8(h), and 10(b) of the Rules of Civil Procedure, be and the same hereby is denied; and it is further

ORDERED, that the motion to dismiss the complaint for failure to file an affidavit showing good cause for the institution of the present proceedings as required by the Immigration and Nationality Act of 1952 be and the same hereby is granted, provided that if the United States files in the Office of the Clerk of this Court and serves on defendant's attorneys, within sixty days after the service of a copy of this Order with Notice of Entry, an affidavit of good cause, the complaint herein shall be reinstated and defendant shall have sixty days thereafter to answer said complaint, as so supplemented, or move with respect thereto; and it is further

ORDERED, that the motions described in paragraphs 2, 3 and 4 of the defendant's Notice of Motion, dated August 9, 1954, be and the same hereby are marked off the calendar subject to restoration on five days' notice, if the complaint be reinstated as aforesaid,

said motions to be referred to me for further consideration and action.

Dated: December 6, 1954.

(S.) EDMUND L. PALMIERI,
U. S. D. J.

31 United States District Court

Southern District of New York

NOTICE OF APPEAL FROM ORDER OF DECEMBER 6, 1954—Filed February 4, 1955

Sirs:

NOTICE is hereby given that the United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from that part of the order of the United States District Court for the Southern District of New York entered in this action on December 6, 1954, providing that the motion to dismiss the complaint for failure to file an affidavit showing good cause for the institution of the present proceedings, as required by the Immigration and Nationality Act of 1952, be granted, provided that if the United States files in the office of the Clerk of the District Court and serves on defendant's attorneys, within sixty (60) days after service of a copy of this order
32 with notice of entry, an affidavit of good cause the complaint herein shall be reinstated and defendant shall have sixty (60) days thereafter to answer said complaint, as so supplemented, or more with respect thereto.

Dated: New York, N. Y., February 4, 1955.

Yours, etc.,

J. EDWARD LUMBARD,
United States Attorney for the
Southern District of New York.
Attorney for Plaintiff.
Office & P. O. Address.
United States Court House,
Foley Square, New York 7, N. Y.

33 In United States District Court

FINAL ORDER DISMISSING COMPLAINT—February 14, 1955

Upon the annexed affidavit of George C. Mantzoros, verified the 3rd day of February, 1955, wherein it appears that the Plaintiff has elected to appeal, and for that reason declines to file an affidavit of good cause, pursuant to the proviso contained in the intermediate Order of this Court, dated December 6, 1954, permitting the filing of an affidavit of good cause, it is hereby

ORDERED, that the complaint be and the same is hereby dismissed without prejudice to the Government's right to institute an action to denaturalize the defendant upon filing an affidavit of good cause.

Dated: New York, N. Y., February 14, 1955.

(S.) EDMUND L. PALMIERI,
U. S. D. J.

34 In United States District Court

AFFIDAVIT IN SUPPORT OF APPLICATION FOR SETTLEMENT OF FINAL ORDER

State of New York,
County of New York,
Southern District of New York—ss.:

GEORGE C. MANTZOROS, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of J. Edward Lumbard, United States Attorney for the Southern District of New York, attorney for plaintiff in the above-entitled action, and I am assigned to and in charge of the prosecution of this action.

2. This affidavit is submitted in support of the Plaintiff's application to settle a final Order herein so that an appeal may be taken from the decision of this Court holding that the complaint herein is defective by reason of failure to file an affidavit showing good cause for the institution of the present proceedings.

3. It is noted that the Order of this Court, dated December 6, 1954, is intermediate in nature and dismisses the complaint provided that, if the United States files in the office of the Clerk of the District Court and serves on defendant's attorney, within

35 sixty (60) days after service of a copy of the Order with notice of entry and affidavit of good cause, the complaint herein shall be reinstated.

4. Your deponent has been advised by the Department of Justice that the Government has elected to appeal and for that reason only declines to file an affidavit of good cause as permitted by the intermediate Order of this Court.

For this reason, it is respectfully prayed that a final Order be entered herein dismissing the complaint without prejudice so that an appeal may be promptly taken and the issue herein resolved.

GEORGE C. MANTZOROS,
Assistant U. S. Attorney.

(Sworn to February 3, 1955.)

36 United States District Court

Southern District of New York

NOTICE OF APPEAL FROM ORDER OF FEBRUARY 17, 1955—Filed February 18, 1955

Sirs:

NOTICE IS HEREBY GIVEN, that the United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of the United States District Court for the Southern District of New York entered in this action and dated February 14, 1955.

Dated: New York, New York, February 17, 1955.

Yours, etc.,

J. EDWARD LUMBARD,
United States Attorney for the
Southern District of New York,
Attorney for plaintiff,
Office & P. O. Address:
Foley Square,
New York 7, N. Y.

To:

JUDD & GURFEIN, Esqs.,
Attorneys for Defendant,
655 Madison Avenue,
New York 21, N. Y.

37 United States Court of Appeals for the Second Circuit

No. 290, October Term, 1954

Argued April 13, 1955

Docket No. 23521

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

ETTORE ZUCCA, also known as Mario Sarni, also known as Ettore Sarni Zucca, DEFENDANT-APPELLEE

OPINION—April 28, 1955

Before CLARK, Chief Judge, and FRANK and HASTIE, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Edmund L. Palmieri, Judge.

Appeal by the United States of America from a final order dismissing a denaturalization action against Ettore Zucca on the defendant's motion for the reason that the requirement of an affidavit of good cause specified in § 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451(a), is a mandatory prerequisite of the institution of the action and must accompany the complaint therein.

Alfred P. O'Hara, Asst. U. S. Atty., New York City (J. Edward Lumbard, U. S. Atty., George C. Mantzoros, Asst. U. S. Atty., and Lester Friedman, Atty., Immigration and Naturalization Service, New York City, on the brief), for plaintiff-appellant.

Orrin G. Judd, New York City (Goldstein, Judd & Gurfein, Morris A. Wirth, Earle K. Moore, and Irwin M. Rosenthal, New York City, on the brief), for defendant-appellee.

PER CURIAM.

Affirmed on the opinion of District Judge Palmieri, D.C.S.D.N.Y., 125 F. Supp. 551.

38 United States Court of Appeals for the Second Circuit

Present: Hon. Charles E. Clark, Chief Judge; Hon. Jerome N. Frank, Hon. William H. Hastie, Circuit Judges.

United States, plaintiff-appellant

v.

Ettore Zucca, etc., defendant-appellee

Judgment—April 28, 1955

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed on the opinion of District Judge Palmieri, D.C.S.D.N.Y., 125 F. Supp. 551.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) A. Daniel Fusaro,
Clerk.

39 Clerk's certificate to foregoing transcript omitted in printing.

40 Supreme Court of the United States, October Term, 1955

No. 213

United States of America, petitioner

vs.

Ettore Zucca, also known as Mario Sarni, also known as Ettore Sarni Zucca

Order Allowing Certiorari—Filed October 10, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1955 365317 555

Office - Supreme Court, U. S.
FILED
JUL 7 1955
HAROLD B. WILLEY, Clerk

No. — 213

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, PETITIONER

v.

ETTORE ZUCCA, ALSO KNOWN AS MARIO SARNI, ALSO KNOWN AS ETTORE SARNI ZUCCA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIMON E. SOBELOFF,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
BEATRICE ROSENBERG,
ISABELLE CAPPELLO,
Attorneys,
Department of Justice,
Washington 25, D. C.

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Atty., George C. Mantzoros, Asst. U.S. Atty., and Lester Friedman, Atty., Immigration and Naturalization Service, New York City, on the brief), for plaintiff-appellant.

Orrin G. Judd, New York City (Goldstein, Judd & Gurfein, Morris A. Wirth, Earle K. Moore, and Irwin M. Rosenthal, New York City, on the brief), for defendant-appellee.

PER CURIAM.

Affirmed on the opinion of District Judge Palmieri, D.C.S.D.N.Y., 125 F. Supp. 551.

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

ETTORE ZUCCA, ALSO KNOWN AS MARIO SARNI, ALSO KNOWN AS ETTORE SARNI ZUCCA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the Southern District of New York, which held that the filing of an affidavit of good cause is a prerequisite to a denaturalization proceeding under Section 340(a) of the Immigration and Nationality Act of 1952.

OPINIONS BELOW

The opinion of the Court of Appeals, set forth in the Appendix, *infra*, pp. 11-12, has not yet been reported. The opinion of the District Court (R. 15-27) is reported at 125 F. Supp. 551 (Appendix, *infra*, pp. 14-28).

JURISDICTION

The judgment of the Court of Appeals was entered on April 28, 1955 (Appendix, *infra*, pp. 13-14). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the filing of an affidavit showing good cause for revocation of naturalization is a prerequisite to the maintenance of a denaturalization suit under Section 340(a) of the Immigration and Nationality Act of 1952.

STATUTE INVOLVED

Section 340(a), Immigration and Nationality Act of 1952, 66 Stat. 163, 260, 8 U.S.C. 1451(a) (1952 ed.):

> It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization

on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, * * *.

STATEMENT

Ettore Zucca was admitted to citizenship on January 4, 1944 (R. 3). In 1954, the United States Attorney for the Southern District of New York, proceeding under Section 340(a) of the Immigration and Nationality Act of 1952, *supra*, filed a verified complaint seeking revocation of such naturalization on the grounds of illegality, concealment of material facts, and wilful misrepresentation (R. 3-10). The complaint stated that good cause existed for the institution of the suit (R. 9), but did not refer to any affidavit showing good cause or append it to the complaint.

The defendant moved to have the complaint dismissed on the ground, among others, that plaintiff failed to file an affidavit showing good cause (R. 11).

The district court held that, before a United States Attorney may institute a denaturalization proceeding, he must be furnished with an affidavit of good cause and, further, that he must file it with the court when instituting the proceeding (R. 26). It ordered the complaint dismissed unless the Government filed an affidavit of good cause within 60 days (R. 30). On February 14, 1955, a final order and judgment dismissed the complaint without prejudice to the Government's right to in-

stitute an action to denaturalize the defendant upon filing the affidavit (R. 33). On appeal to the Court of Appeals for the Second Circuit, the order of the district court was affirmed.

REASONS FOR GRANTING THE WRIT

1. The decision of the Second Circuit in the instant case is directly contrary to the holding of the Seventh Circuit in *United States* v. *Tuteur*, 215 F. 2d 415, where, in a proceeding to review a summary judgment canceling a certificate of naturalization, the court overruled the contention that the district court should have dismissed the petition for lack of jurisdiction in that the action was instituted without a supporting affidavit showing good cause. It is also contrary to the ruling of the Ninth Circuit in *Schwinn* v. *United States*, 112 F. 2d 74, affirmed *per curiam*, 311 U.S. 616.[1] Although the *Tuteur* case arose under Section 338 of the Nationality Act of 1940 and the *Schwinn* case under Section 15 of the Nationality Act of 1906, the clauses of these sections referring to the affidavit are identical to the affidavit clause of Section 340(a) of the Immigration and Nationality

[1] The transcript of the record in that case shows that the affidavit was filed with the complaint. The point as to the necessity for an affidavit was discussed by the Court of Appeals in connection with the argument that the judgment should be reversed because no evidence had been introduced at the trial to the effect that the district attorney had been presented with an affidavit showing the deficiencies in the petition for naturalization. The affidavit issue was not argued before this Court, which affirmed the judgment below on the ground that citizenship had been illegally procured.

Act of 1952, which is here involved. The Ninth Circuit stated in the *Schwimm* case (pp. 74-75):

> This affidavit is not jurisdictional, but merely makes it the duty of the district attorney to proceed. The district attorney could institute proceedings of this character sua sponte whenever he had reason to believe that the law had been violated in the respect alleged in the petition.

The Second Circuit in its *per curiam* opinion in this case relied upon the opinion of the district court, which recognized the conflicting view of the Seventh and Ninth Circuit and also of several district courts: *United States* v. *Jerome*, 115 F. Supp. 818 (S.D. N.Y.); *United States* v. *Lustig*, 110 F. Supp. 806 (S.D. N.Y.); *United States* v. *Knight*, 291 Fed. 129 (D. Mont.), affirmed, 299 Fed. 571 (C.A. 9); *United States* v. *Leles*, 227 Fed. 189 (N.D. Cal.).[2]

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[2] See also to the same effect: *United States* v. *Radzie*, 14 F.R.D. 151 (S.D. N.Y.); *United States* v. *Ronch*, unreported, S.D. N.Y., Civ Div. 77-290 (1953); *United States* v. *Collins*, unreported, S.D. N.Y., Civ. Div. 93-39, Jan. 4, 1955; *United States* v. *Stefena Brown*, unreported, E.D. Mich., No. 12628, Feb. 15, 1955; *United States* v. *Leo Fischer*, unreported, N.D. Ill., No. 54 C 614, Mar. 2, 1955; *United States* v. *Celia Miller*, unreported, N.D. Cal., March 24, 1955; *United States* v. *Hyman Kaplan*, unreported, D. Conn., Civ. Action 3509, March 28, 1955; *United States* v. *Alexander Shinkevich*, unreported, E.D. Pa., April 26, 1955; *United States* v. *Mankin*, unreported, W.D. Pa., C.A. #10934. Cases containing dicta to the effect that the affidavit is not jurisdictional are: *United States* v. *Schuchhardt*, 48 F. Supp. 876 (N.D. Ind.); *United States* v. *Favorito*, 7 F.R.D. 152 (N.D. Ohio).

This conflict of circuits is one which should be resolved by this Court. It affects not only numerous pending denaturalization actions in which no affidavit has been filed, but the future course of action by United States Attorneys in such suits. Moreover, the question of the necessity for filing the affidavit has implications beyond the immediate point directly at issue. The district court in this case, in ruling that filing of the affidavit was required, stated that "the protection afforded by the requirement of an affidavit of good cause would be seriously impaired if the defendant in a denaturalization action could not examine it and test its sufficiency by motion before trial" (Appendix, *infra*, p. 27). Thus, the holding in the instant case raises problems as to the nature of the affidavit—whether it can be based on information and belief after consideration of evidence accumulated in an administrative investigation, or whether there must be an affidavit of some one having personal knowledge. It also raises problems as to the conduct of the judicial proceeding—whether there can be in effect a pre-trial of the issues in the guise of a determination as to whether there is good cause for instituting the action. In short, the issue as to the necessity for filing the affidavit presents more than a mere technicality; it may seriously affect the practice in denaturalization cases.

2. We believe that the holding of the Seventh and Ninth Circuits is correct. The statute simply makes mandatory the institution of proceedings to denaturalize when a showing of good cause is esta-

blished. Prior to the Act of 1906, which was the first to provide a statutory method of denaturalization, bills in equity had been filed by United States district attorneys to accomplish denaturalization.[3] The Act of 1906, therefore, only made mandatory what was previously discretionary. It is not fitting to attribute to Congress the intention that a district attorney, knowing of the fraudulent or illegal procurement of a naturalization certificate, must sit idly by and await the filing of an affidavit, setting forth what he already knows, before he can proceed.

The legislative history relied upon by the district court below is inconclusive. It shows merely that the provision making it the duty of the United States Attorneys to act on an affidavit of good cause was added by Congress without explanation in 1906, when it was considering the proposed uniform naturalization law drafted by members of the Commission on Naturalization appointed by President Theodore Roosevelt. The affidavit requirement first appeared in Section 17 of H.R. 15442, 59th Cong., 1st sess., which was based on the draft prepared by the Commission, as a provision that the "United States shall, upon affidavit made by any credible person, have the power to institute proceedings * * *." The change in language to the present form, making it the duty of the United States Attorneys to act, was without recorded con-

[3] See 40 Cong. Rec. 3640; President Harrison's Address to Congress, 1890, 9 Richardson, *A Compilation of the Messages and Papers of the Presidents: 1789-1897*, p. 116.

gressional comment or debate. The legislative history is thus consistent with the view that Congress intended to require United States Attorneys to take action when they were presented with an affidavit of good cause, rather than leaving the matter to their discretion.

The district court also found support for its interpretation in a letter dated March 26, 1907, from the Attorney General of the United States advising the Secretary of Commerce and Labor, who was then charged with the administration of the immigration and naturalization laws, that the filing of an affidavit was necessary to give a United States Attorney authority to institute denaturalization proceedings. That letter, however, loses its authority in the face of the contrary construction in the *Schwinn* case, 113 F. 274, affirmed 311 U.S. 616, decided in 1940, long before reenactment of the clause in the 1952 Act. Although the practice among United States Attorneys has not been consistent, the ruling of the *Schwinn* case has been relied upon by many United States Attorneys for a long period.

CONCLUSION

In view of the conflict between the Second Circuit, in this case, and the Seventh and Ninth Circuits, in earlier cases, and in view of the importance of the question presented in the administration of the Immigration and Nationality Act of 1952, it is respectfully submitted that this petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
ISABELLE CAPPELLO,
Attorneys.

JULY 1955

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 290, October Term, 1954

Argued April 13, 1955 Decided April 28, 1955

Docket No. 23521

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

ETTORE ZUCCA, also known as Mario Sarni, also known as Ettore Sarni Zucca, DEFENDANT-APPELLEE

Before CLARK, Chief Judge, and FRANK and HASTIE, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Edmund L. Palmieri, Judge.

Appeal by the United States of America from a final order dismissing a denaturalization action against Ettore Zucca on the defendant's motion for the reason that the requirement of an affidavit of good cause specified in § 340(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1451(a), is a mandatory prerequisite of the institution of the action and must accompany the complaint therein.

Alfred P. O'Hara, Asst. U.S. Atty., New York City (J. Edward Lumbard, U.S.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of April one thousand nine hundred and fifty-five.

Present:

HON. CHARLES E. CLARK,
Chief Judge,
HON. JEROME N. FRANK,
HON. WILLIAM H. HASTIE,
Circuit Judges.

UNITED STATES, PLAINTIFF-APPELLANT

v.

ETTORE ZUCCA, ETC., DEFENDANT-APPELLEE

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed on the opinion of District Judge Palmieri, D.C.S.D.N.Y., 125 F. Supp. 551.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) A. DANIEL FUSARO,
Clerk.

FILED: Apr. 28, 1955.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, PLAINTIFF

against

ETTORE ZUCCA, also known as MARIO SARNI, also known as ETTORE SARNI ZUCCA, DEFENDANT

Appearances:

Hon. J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for United States. George C. Mantzoros, Esq., Assistant United States Attorney of Counsel.

Judd & Gurfein, Esqs., 655 Madison Avenue, New York 21, N. Y., Attorneys for Defendant. Orrin Judd, Esq. of Counsel.

OPINION

PALMIERI, D. J.

The defendant was naturalized by this Court on January 4, 1944. The United States now brings this action under section 340(a) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 260, 8 U.S.C. § 1451(a) (1952 ed.), to revoke and set

aside the order admitting the defendant to citizenship and to cancel the defendant's certificate of naturalization on the grounds that the defendant's naturalization was illegally procured and that the defendant concealed material facts and wilfully misrepresented others in the course of the proceedings leading to his naturalization.

The defendant has moved that the complaint be dismissed because of (1) the Government's alleged failure to draft an adequate complaint and (2) the Government's failure to file an affidavit showing good cause for the institution of the instant proceeding. The defendant argues that the Government's complaint is procedurally inadequate because it allegedly fails to comply with Rules 8(a), 8(e) (sic), 9(b), and 10(b) of the Rules of Civil Procedure. These Rules deal with the general rules of pleading, the particularity with which fraud should be pleaded, and the form of pleadings. Defendant asserts that the complaint fails to give fair notice of the Government's claim, but it is clear that this assertion is without merit. The complaint alleges that the defendant's naturalization was illegally procured in that it was prohibited by section 305 of the Nationality Act of 1940 and that the defendant concealed material facts and misrepresented others in the course of the proceedings leading to his naturalization. It sets forth the alleged act which made the procurement of defendant's naturalization illegal and the allegedly concealed and misrepresented facts with what may well be unnecessary specificity for a civil complaint.

In view of this, it would appear that the defendant is merely saying that a better complaint should have been drawn. However, it is not the function of this court to pass on the artistic merits of pleadings. See *Dioguardi* v. *Durning,* 139 F. 2d 774 (2d Cir. 1944). The complaint not only gives the defendant fair notice of the Government's claim but it also informs him of the alleged facts upon which that claim is based. The motion to dismiss the complaint because it is procedurally inadequate is therefore denied.

The defendant has also moved that the complaint be dismissed because of the Government's failure to file an affidavit showing good cause for the institution of this proceeding. He contends that the filing of such an affidavit is required by section 340(a), 8 U.S.C. § 1451(a) (1952 ed.), which reads:

> "It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings . . . for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization. . . ."

Section 340(a) is derived from section 338(a) of the Nationality Act of 1940, 54 Stat. 1137, 1158 which was derived from section 15 of the Act of June 29, 1906, 34 Stat. 596, 601 (1906), the first enactment providing for denaturalization on the grounds of fraud or illegal procurement. See S. Rept. No. 1137, 82d Cong., 2d Sess. 45 (1952); S.

Rept. No. 1515, 81st Cong., 2d Sess. 755 (1950). The 1906 Act contained the language:

> "it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings . . ."

to denaturalize a person on the grounds of fraud or illegal procurement; and the quoted language was incorporated into the 1940 and 1952 acts without Congressional comment.

The Government contends that the source of a United States Attorney's power to institute civil denaturalization actions is the

> "duty of each United States attorney, within his district, to . . . prosecute . . . for the government, all civil actions, suits or proceedings in which the United States is concerned. . . ."

28 U.S.C. §507(a)(2) (1952 ed.). The position taken by the Government is that United States Attorneys had the power to institute civil denaturalization actions before the passage of the Act of June 29, 1906, and that the 1906 Act and its later re-enactments did not circumscribe this power. See H. R. Doc. No. 46, App. D, 59th Cong., 1st Sess. 76, 78 (1905); *Bindczyck* v. *Finucane*, 342 U. S. 76, 79 n. 3 (1951); *United States* v. *Mansour*, 170 Fed. 671, 675 (S.D. N.Y. 1908); *United States* v. *Norsch*, 42 Fed. 417 (C.C.E.D. Mo. 1890). The Government supports its position by showing that Con-

gress was well aware that United States Attorneys were conducting civil denaturalization actions when it enacted the 1906 Act and did not indicate that it wished to curtail their power to do so. See H. R. Rept. No. 1789, 59th Cong., 1st Sess. 2 (1906); statement of Congressman Bonynge, manager of the bill, 40 Cong. Rec. 3640 (1906); statement of Congressman Hayes, 40 Cong. Rec. 7043 (1906). From this the Government concludes that in providing that

> "it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor . . ."

to institute denaturalization proceedings, Congress merely imposed a requirement that United States Attorneys institute such proceedings whenever they were furnished with an affidavit of good cause. It did not intend, the argument runs, that a United States Attorney should be powerless to institute proceedings if he had not been furnished with an affidavit.

Although it can be assumed that the civil denaturalization actions initiated by the Government prior to the passage of the Act of June 29, 1906 were valid, see *Johannessen* v. *United States*, 225 U. S. 227, 240 (1912); S. Rept. No. 1515, 81st Cong. 2d Sess. 754 (1950), I cannot agree with the Government's conclusions. The legislative history of the Act of June 29, 1906 indicates (1) that the procedure first outlined in section 15 of that Act, and

now set forth in section 340 of the Immigration and Nationality Act of 1952, is the only procedure for denaturalizing a person on the grounds of fraud or illegal procurement, and (2) that this procedure requires that before a United States Attorney can institute a civil denaturalization action he must be furnished with an affidavit of good cause.

The Government's premise that the legislative history of the 1906 Act does not indicate that Congress intended to restrict the theretofore exercised power of United States Attorneys to institute civil denaturalization actions is, in my opinion, invalid. The Government apparently assumes that Congress intended the procedure which is set forth in section 15 of the 1906 Act to be an alternative to the procedure in use before the Act took effect. But section 15 and its legislative history furnish abundant evidence that Congress intended that the procedure set forth in that section should be followed whenever civil denaturalization actions were thereafter initiated.

In addition to referring to the affidavit of good cause section 15 provided that a defendant in a denaturalization proceeding should have 60 days personal notice in which to answer the complaint unless he was absent from the United States or from the district in which he had last resided. And, after the bill that later became the 1906 Act was introduced, Section 15 was amended to provide that a denaturalization action could only be instituted in a court in the judicial district in which the naturalized citizen resided. See statement of Con-

gressman Bonynge, manager of the bill, 40 Cong. Rec. 7874 (1906).

The fact that Congress inserted these requirements for the protection of naturalized citizens in the 1906 Act is inconsistent with the Government's position. It indicates that in enacting section 15 of that Act Congress did intend to limit the theretofore exercised power of United States Attorneys to institute civil denaturalization actions. For if, as the Government contends, the power of United States Attorneys to institute such actions is derived from 28 U.S.C. §507(a)(2) (1952 ed.), which empowers United States Attorneys to prosecute all civil actions in which the Government is concerned, and is not restricted by the provisions of section 340 of the Immigration and Nationality Act of 1952 (a re-enactment of section 15 of the 1906 Act so far as is material to the decision of the instant motion), the provisions which safeguard naturalized citizens are effective only if United States Attorneys choose to give them effect by proceeding under section 340 instead of under their general power to prosecute all civil actions for the Government. An interpretation which gives such cavalier treatment to important safeguards insisted on by Congress cannot be sustained. I therefore conclude that the power of United States Attorneys to institute civil denaturalization actions is derived from and limited by the provisions of section 340 of the Immigration and Nationality Act of 1952. *Cf. Bindczyck* v. *Finucane*, 342 U. S. 76, 81-84 (1951); *Volpe* v. *Jordan*, 161 F. 2d 390, 395 (7th Cir. 1947).

This determination still leaves open the following questions:

> (1) Whether section 340(a) requires that a United States Attorney be furnished with an affidavit of good cause before he can institute a denaturalization proceeding; and
> (2) if such an affidavit is required, whether a United States Attorney must file it with the court when instituting a denaturalization proceeding.

In support of its contention that United States Attorneys may institute denaturalization proceedings even though they have not been furnished with affidavits of good cause the Government relies on cases which hold or contain dicta to the effect that a United States Attorney can "institute proceedings of this character sua sponte whenever he ha(s) reason to believe that the law ha(s) been violated. . . ." *Schwinn* v. *United States*, 112 F. 2d 74, 75, 76 (9th Cir.), aff'd "on the sole ground that the certificate of citizenship was illegally procured," 311 U. S. 616 (1940); *United States* v. *Jerome*, 115 F. Supp. 818 (S.D. N.Y. 1953); *United States* v. *Lustig*, 110 F. Supp. 806 (S.D. N.Y. 1953); *Cf. United States* v. *Tuteur*, 215 F. 2d 415 (7th Cir. 1954); *United States* v. *Knight*, 291 Fed. 129 (D.C. Mont. 1923); *United States* v. *Leles*, 227 Fed. 189 (N.D. Cal. 1915).

To the extent that these cases are predicated upon the view that United States Attorneys possess the power to initiate civil denaturalization actions unfettered by the provisions of section 340,

the preceding portion of this opinion shows why I cannot agree with them.

Moreover, it does not appear that any of the cases cited by the Government considered the legislative history of section 340 which has been referred to above, and only two referred to *Bindczyck* v. *Finucane*, 342 U.S. 76 (1951). One distinguished it on the ground that it dealt with denaturalization proceedings instituted in a state rather than a federal court. See *United States* v. *Jerome*, 115 F. Supp. 818 (S.D.N.Y. 1953). With deference, however, I believe that this distinction does not give sufficient weight to the reasoning of the *Bindczyck* case. In that case the Court said:

> "In the light of . . . (the legislative history of section 15 of the 1906 Act) we cannot escape the conclusion that in its detailed provisions for revoking a naturalization because of fraud or illegal procurement not appearing on the face of the record, Congress formulated a self-contained, exclusive procedure. With a view to protecting the Government against fraud while safeguarding citizenship from abrogation except by a clearly defined procedure, Congress insisted on the detailed, explicit provisions of § 15. . . .
>
> "Between them, these two sections, § 11 and § 15, provided a complete and exclusive framework for safeguarding citizenship against unqualified applicants. . . . (I)f citizenship was granted, it was to be proof against attacks for fraud or illegal procurement based on evi-

> dence outside the record, except through the proceedings prescribed in § 15. The congressional scheme, providing carefully for the representation of the Government's interest before the grant of citizenship and a detailed, safeguarded procedure for attacking the decree on evidence of fraud outside the record, covers the whole ground. . . ." pp. 83-84.

I believe that the "self contained, exclusive procedure" must be followed in denaturalization proceedings instituted in federal courts as well as those instituted in state courts.

The other, *United States* v. *Lustig*, *supra*, considered itself bound by the Supreme Court's affirmance of the lower court's disposition of the *Schwinn* case, although it stated that "it would seem, the reasoning of the Court of Appeals in the *Schwinn* case has been repudiated" by the Supreme Court's reasoning in the *Bindczyck* case. See p. 808 n. 3. It has already been pointed out that the Supreme Court affirmed *Schwinn* v. *United States*, 112 F. 2d 74 (9th Cir. 1940), "on the sole ground that the certificate of citizenship was illegally procured." See 311 U.S. 616 (1940). And examination of the briefs submitted to the Supreme Court indicates that the issue of the power of a United States Attorney to institute a civil denaturalization action when he has not been furnished with an affidavit of good cause, was not raised before that Court. Therefore, I cannot regard the Supreme Court's affirmance of the lower court's disposition of the

Schwimm case as being dispositive of this issue.

Nor can I agree with the cases cited by the Government if they are interpreted as holding only that section 340(a) does not require that a United States Attorney be furnished with an affidavit of good cause before he can institute a denaturalization proceeding. This opinion has already shown that section 340(a) is derived from section 15 of the Act of June 29, 1906 and is similar to that section in all respects that are material to the decision of the instant motion. Section 15 of the 1906 Act was itself derived from section 34 of a proposed uniform naturalization law drafted by two members of the Commission on Naturalization appointed by President Theodore Roosevelt. It provided:

> "The United States shall have the power to institute proceedings . . . for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate . . . was illegally issued . . . ." H.R. Doc. No. 46, App. F, 59th Cong., 1st Sess. 106 (1906).

It will be noted that this draft did not mention an affidavit of good cause. But when the bill which later became the 1906 Act was reported out of committee the committee report said that an important feature of the bill was that

> "(p)ower is given to the United States, *upon affidavit of any credible person*, to institute proceedings to cancel any certificate of citizenship which may have been procured through fraud or otherwise illegally obtained."

See H.R. Rept. No. 1789, 59th Cong., 1st Sess. 5-6 (1906) (emphasis added); and statement of Congressman Bonynge, 40 Cong. Rec. 7874 (1906). Since it appears that Congress altered the draft provision to refer to an affidavit of good cause, it can be assumed that Congress considered the affidavit significant and intended to condition the power of the United States to institute denaturalization proceedings upon the furnishing of such an affidavit to a United States Attorney.

This view of the legislative history of section 15 of the 1906 Act is supported by a contemporaneous administrative interpretation of that section. In a letter dated March 26, 1907 the Attorney General of the United States advised the Secretary of Commerce and Labor, who was then charged with the responsibility of administering the immigration and naturalization laws, as follows:

> "The Honorable
> The Secretary of Commerce and Labor.
>
> Sir:
>
> The Department has the honor to acknowledge receipt of your letter of March 18th in which you ask whether the filing of an affidavit is necessary to give a United States attorney authority to institute proceedings in any court for the cancellation of a naturalization certificate. It appears to the Department that this is the case. The object of the provision undoubtedly is to protect holders of certificates from annoyance and attorneys

from unnecessary labor as the result of mere complaints by individuals unable to produce evidence and unwilling to assume the responsibility therefor, as suggested in your letter; but it also seems clear to me that Congress has seen fit to prescribe the method by which this protection to those holding naturalization certificates is to be enforced.

I am, therefore, of opinion that before any United States attorney is authorized to institute proceedings for the cancellation of a naturalization certificate he should be furnished with a proper affidavit on which the proceedings may be based.

Respectfully,

Charles J. Bonaparte
Attorney General.

See unpublished opinion Att'y Gen., March 26, 1907, National Archives; *Cohen* v. *United States*, 38 App. D.C. 123 (D.C. Cir. 1912); Van Dyne, A Treatise on the Law of Naturalization of the United States 138 (1907).

Because of the legislative history of the denaturalization provision and the weight to be given to a contemporaneous administrative interpretation of a statute by the officer charged with its enforcement, see *Fawcus Machine Co.* v. *United States*, 282 U.S. 375, 378 (1931), I hold that before a United States Attorney may institute a denaturalization proceeding he must be furnished with an affidavit of good cause.

The final question for decision is whether a United States Attorney must file the affidavit of good cause that has been furnished to him with the court when instituting a denaturalization proceeding. I believe that he must do so. The instant proceeding is of the most serious import. "'Denaturalization . . . may result in the loss of all that makes life worth living.'" *See Knauer* v. *United States*, 328 U.S. 654, 659 (1946). It is often a preliminary step to deportation with its attendant rending of the social and familial roots and ties that have become the life of the deportee. Indeed, the mere initiation of a denaturalization proceeding may have serious adverse consequences for the naturalized citizen.

Thus, there can be no doubt that Congress had good reason to surround denaturalization actions with the safeguards prescribed by section 15 of the 1906 Act and its reenactments, one of which is the affidavit of good cause. But, the protection afforded by the requirement of an affidavit of good cause would be seriously impaired if the defendant in a denaturalization action could not examine it and test its sufficiency by motion before trial. *Cohen* v. *United States*, 38 App. D.C. 123 (D.C. Cir. 1912); *United States* v. *Richmond*, 17 F. 2d 28 (3d Cir. 1927); *United States* v. *Salomon*, 231 Fed. 928 (5th Cir. 1916); unpublished opinion of Judge Ryan in *United States* v. *Candela*, Civil No. 93-308 (S.D.N.Y. October 14, 1954).

Since the absence of an affidavit of good cause in the instant case deprives the defendant of a pro-

tection which Congress has afforded him, the complaint is dismissed unless the Government files such an affidavit within 15 days. My decision makes it unnecessary for me to decide certain procedural questions posed by the defendant's alternative motions. However, I am prepared to deal with them should the future course of this action warrant it.

Settle order on notice.

NOVEMBER 16, 1954.

EDMUND L. PALMIERI,
U.S.D.J.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, PETITIONER

v.

ETTORE ZUCCA, ALSO KNOWN AS MARIO SARNI, ALSO KNOWN AS ETTORE SARNI ZUCCA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

SIMON E. SOBELOFF,
Solicitor General,
WARREN OLNEY III,
Assistant Attorney General,
GRAY THORON,
Assistant to the Solicitor General,
BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys,
Department of Justice, Washington 25, D. C.

L. PAUL WININGS,
General Counsel,
Immigration and Naturalization Service,
Washington 25, D. C.

When the statute is analyzed in the light of the normal meaning of the words and the sentence structure actually used by Congress and in the full context of the entire legislative history of the section and its two identically worded predecessors, the decision below is seen to be erroneous.

A. THE WORDS AND SENTENCE STRUCTURE USED BY CONGRESS DO NOT MANIFEST A PURPOSE TO MAKE THE AFFIDAVIT A JURISDICTIONAL OR PROCEDURAL PREREQUISITE TO MAINTAINING THE ACTION

Section 340 (a) of the Immigration and Nationality Act of 1952 (*supra*, pp. 2–3) is a reenactment of Section 338 (a) of the Nationality Act of 1940, 54 Stat. 1137, 1158. The 1940 enactment, in turn, was a reenactment of Section 15 of the Act of June 29, 1906, 34 Stat. 596, 601, which was the first statute relating to denaturalization. In each statute the following identical language appeared:

> It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings * * *.[1]

In each enactment, in the second portion of the sentence, *after* the part above quoted establishing a duty to proceed, provision was made for venue of denaturalization proceedings in the district of the defendant's residence. In a separate sentence or, in the reenactments, in a separate

[1] By a 1954 amendment, the word "district" was deleted from Section 340 (a) before "attorneys", so as to make this section conform with the revised designation used in the Judicial Code. 68 Stat. 1232.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 213

UNITED STATES OF AMERICA, PETITIONER

v.

ETTORE ZUCCA, ALSO KNOWN AS MARIO SARNI, ALSO KNOWN AS ETTORE SARNI ZUCCA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The *per curiam* affirmance by the Court of Appeals (R. 24) is reported at 221 F. 2d 805. The opinion of the District Court (R. 11–19) is reported at 125 F. Supp. 551.

JURISDICTION

The judgment of the Court of Appeals was entered on April 28, 1955 (R. 25). The petition for a writ of certiorari was filed on July 7, 1955, and was granted on October 10, 1955 (R. 25). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether Section 340 (a) of the Immigration and Nationality Act of 1952 makes the furnishing or filing of an affidavit showing good cause a jurisdictional or procedural prerequisite to maintaining a denaturalization action brought in good faith by a United States attorney.

STATUTE INVOLVED

Section 340 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 260, as amended, 68 Stat. 1232, 8 U. S. C., Supp. II, 1451, in pertinent part provides:

REVOCATION OF NATURALIZATION

SEC. 340. (a) It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, * * *. If the naturalized citizen does not reside in any judicial district in the United States at the time of bringing such suit, the proceedings may

be instituted in the United States District Court for the District of Columbia or in the United States district court in the judicial district in which such person last had his residence.

(b) The party to whom was granted the naturalization alleged to have been procured by concealment of a material fact or by willful misrepresentation shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice, unless waived by such party, in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given either by personal service upon him or by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

* * * * *

STATEMENT

Respondent Ettore Zucca was naturalized on January 4, 1944 (R. 2). In 1954, the United States Attorney for the Southern District of New York, proceeding under Section 340 (a) of the Immigration and Nationality Act of 1952 (*supra*, pp. 2–3), filed a complaint in the United States District Court in that district, seeking revocation of respondent's naturalization on the grounds of

illegality, concealment of material facts, and willful misrepresentation (R. 2–6). The complaint specifically set forth the written documents and examinations in which respondent had been required to state his membership in organizations and in which he had failed to disclose his membership in the Communist Party and in affiliated organizations (R. 2–3). The complaint, which was verified (R. 6–7, 8), did not refer to or append an affidavit of good cause, but embodied, in addition to the specific allegations, a statement that "good cause exists for the institution of this suit" (R. 6).

Respondent moved to have the complaint dismissed, asserting, among other grounds, that petitioner was required by the Act to file or serve an affidavit showing good cause for the institution of the proceedings (R. 9).

The District Court (Palmieri, J.) held that, before a United States attorney may institute a denaturalization proceeding, he must be furnished with an affidavit of good cause and, further, that he must file it with the court when instituting the proceeding (R. 18). The court ordered the complaint dismissed unless the Government filed an affidavit showing good cause within sixty days (R. 20). On February 14, 1955, by a final order the complaint was dismissed without prejudice to the Government's right to institute an action to denaturalize the defendant upon filing the affidavit (R. 22). On appeal to the Court of Appeals for the Second

Circuit; the order of the District Court was affirmed, *per curiam* (R. 24).

SUMMARY OF ARGUMENT

Section 340 (a) of the Immigration and Nationality Act of 1952 (*supra*, pp. 2–3), does not make the furnishing or filing of an "affidavit showing good cause" a jurisdictional or procedural prerequisite to maintaining denaturalization proceedings brought in good faith by a United States attorney.

A. Section 340, in so far as here pertinent, discloses in its language and structure a clear twofold effect. First, it imposes a duty upon the United States attorney to start proceedings, at the instance of others, for revocation of naturalization, in which case an "affidavit showing good cause" must be furnished to him. In this connection, the section uses the following language:

> It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings * * *.

Secondly, the section specifically and separately sets forth the procedural requirements relating to denaturalization proceedings, *i. e.*, which courts shall have jurisdiction, and the types of notice to which a defendant is entitled. The provision for an affidavit showing good cause is not placed among the procedural requirements. It appears only with the words imposing a duty to start an action

at the instance of others than the United States attorney, and is no part of the description of the action to be brought. The statute imposes a "duty", and it is only the duty that is subject to the condition of an "affidavit showing good cause".

Thus, giving effect to the normal meaning of the words and the sentence structure actually used by Congress, it appears from the face of the statute that the affidavit is not a prerequisite to maintaining a denaturalization proceeding at the instance of the United States attorney.

B. The legislative history of Section 340 does not manifest a purpose to make the affidavit a prerequisite, but rather confirms the view of the limited purpose of the statutory reference to an affidavit.

1. The exact language here involved was first enacted in 1906, in an atmosphere substantially charged with distrust of the then enforcement of naturalization requisites. There had been an extensive history of quick and unlawful naturalization of huge blocks of immigrant voters on the eves of elections, raising natural doubts, which were expressed on the floor of Congress, as to whether government attorneys might be guilty of exercising their powers with respect to naturalization in accordance with the expected vote of the persons involved. Bills had been introduced at the 1906 session of Congress, and before, providing for institution of denaturalization complaints by any "citizen". The language imposing a "duty"

upon the United States attorneys to act is accordingly explainable as a concession to this proposal to enforce action when the United States attorney failed to act. The provision that the duty should be "upon affidavit" represents a safeguard against abuse, by irresponsible outsiders, of this power to require government action. Preceding drafts, granting no such powers to outsiders, had included only notice and venue provisions, apparently deemed sufficient as protection for the naturalized citizens. The "good cause" affidavit thus appeared as a preliminary condition to forcing the institution of a revocation proceeding, and not as a part of the proceeding itself.

The departure by the court below from the current decisions and practice, which have made such affidavits unnecessary in a proceeding instituted by the United States attorney, is sought to be justified largely upon the supposition that the decision in *Bindczyck* v. *Finucane,* 342 U. S. 76, requires such a change, and that a letter of the Attorney General in 1907 also confirms the District Court's new view of the legislative purpose. However, this Court, in *Bindczyck,* held only that proceedings under the instant section were exclusive of other proceedings for revocation—specifically, a state court revocation within term time. There was no question or discussion of what was or was not a procedural necessity of the action. Even more clearly, there was, of course, no holding that everything mentioned in the en-

actment was a jurisdictional requisite of the proceeding itself. It was conceded in *Bindczyck* that the notice and venue provisions of the statute had not been observed; conversely, no issue was raised as to filing an affidavit in court.

With respect to the ambiguous 1907 Attorney General's letter, relied upon by the district judge below, the long-standing practice of subsequent Attorneys General demonstrates a more authoritative recognition of the sound view of the statute and its history, *i. e.*, that the affidavit is a condition to imposing a duty upon the United States attorney to institute proceedings when he does not do so at his own instance, and is not a part of the proceeding itself. This was also the preponderance of judicial opinion subsequent to the enactment of the 1906 statute.

2. By the time of the reenactment of the 1906 statute, first in 1940 and again in 1952, the courts had quite generally held that the affidavit was not a jurisdictional requirement. The last of the few expressions of opinion to the contrary had been in 1927. It is reasonable to assume that the legislators, in reenacting the statute, had no intent to make the affidavit a jurisdictional or procedural requirement in the action itself, contrary to the meaning which is most logically drawn from the wording and structure of the section. Thus historically, and on the face of the statute, the affidavit was never designed to require a duplicitous, unnecessary reaffirmation of the responsible

charges represented by the filing of a complaint by a United States attorney. The affidavit was a means of protection when the machinery of a United States attorney's office was to be set in motion by an outsider, a method tending to assure that the duty to act would not be irresponsibly invoked. The affidavit is not a prerequisite to the action of the United States attorney in instituting suit through a formal complaint, brought in good faith following administrative investigation.

ARGUMENT

DENATURALIZATION PROCEEDINGS INSTITUTED IN GOOD FAITH BY A UNITED STATES ATTORNEY ARE NOT SUBJECT TO DISMISSAL BECAUSE OF THE ABSENCE OF AN AFFIDAVIT

In interpreting the provisions of Section 340 (a) of the Immigration and Nationality Act of 1952 (*supra*, pp. 2–3), the district judge decided that Congress had intended denaturalization proceedings to be subject to dismissal whenever the United States attorney brings suit without having *and producing* a supporting "affidavit showing good cause" (R. 16–19).

This holding does not rest upon any affirmative mandate appearing either in Section 340 (a) or in any other portion of the Act. Rather, it is based upon a negative implication not needed to achieve any of the manifested purposes or objectives of Section 340 (a). Furthermore, it is in direct conflict with prior decisions in two circuits and in a number of districts (*infra*, pp. 17–18, 33–34, 37–38).

paragraph, provision was made for sixty days' notice to the defendant.[2]

It is patent from this statutory structure that the reference to an affidavit relates solely to the language making it mandatory for the United States attorney, "upon" such affidavit, to institute the revocation proceeding. The phrase concerning the affidavit is interlocked with the words imposing the duty to institute the proceedings, and is textually unconnected with anything else in the statute. The affidavit from which stems the "duty * * * to institute proceedings" thus has no relation to the procedural or jurisdictional requirements of the action actually instituted, which are spelled out in a different portion of the statute.

The normal implication to be drawn from this statutory structure becomes the more controlling in view of the nature of the proceedings involved.[3] When a proceeding under this section is instituted by the United States attorney, there is of necessity a complaint providing the naturalized person all the elements of responsibility afforded by an affidavit. It is not reasonable to read the statute as requiring a duplication of what the complaint it-

[2] Under the 1906 and 1940 Acts, the grounds of the action were fraud and illegal procurement. The 1952 Act specified the grounds as procurement "by concealment of a material fact or by willful misrepresentation".

[3] Legislation is, of course, to be construed in the setting of existing law and practice. See *United States* v. *Sanges*, 144 U. S. 310, 311. Cf. *Stark* v. *Wickard*, 321 U. S. 288, 309; *Byrnet* v. *Harmel*, 287 U. S. 102, 108.

self necessarily sets forth.[4] If the statute is interpreted, in accordance with its language and structure, as requiring action by the United States attorney at the instance of other parties, then the requirement of an affidavit before such duty arises has a sound basis as precluding irresponsible persons from forcing the United States attorney to act without good cause.

The matter has been expressed as follows in *United States* v. *Leles*, 227 Fed. 189, 190 (N. D. Cal.):

> If the disclosures of the affidavit are such as to show "good cause"—that is, facts which, if sustained by proof, would afford ground for revoking the grant of citizenship involved, either for fraud or illegality—it is made [the United States Attorney's] duty to proceed and institute proceedings to have the validity of the grant judicially investigated and determined. When it has accomplished this purpose of

[4] The Federal Rules of Civil Procedure require every pleading of a party represented by an attorney to be signed by at least one attorney of record. In the absence of specific statutory provision no formal verification or affidavit is required, but "[t]he signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it" (Rule 11). In the instant case, moreover, it was certified in the complaint "[t]hat good cause exists for the institution of this suit and the plaintiff is entitled to have the order of the court admitting the defendant to citizenship * * * revoked" (R. 6). And see the affidavits verifying the complaint and supplementing the verification (R. 6–7, 8).

> putting the wheels of justice in motion, the affidavit would seem to have fulfilled its office, and so far as anything appearing in the act to the contrary, becomes functionless. It is obviously not intended to serve as a pleading, since, in requiring a "suit" to be brought, the statute contemplates the filing of a formal complaint.

There is nothing in the wording of the statute to support the interpretation of the district judge below that words, which on their face impose this affirmative duty on the United States attorneys, at the same time by implication impose a limitation on the power of such officers to act in the absence of an affidavit (R. 13–16). The imposition of a duty is not normally consistent with the idea of limitation. It was always the duty of United States attorneys, in the words of present 28 U. S. C. 507 (a) (2), to prosecute "for the government, all civil actions, suits or proceedings in which the United States is concerned". If Congress, by the statute here involved and its identically worded predecessors, had decided to cut down on that duty, it would have almost certainly used appropriate words to make plain its purpose, and not have left the matter to what is at best an ambiguous negative implication. The normal sense of the instant statute is that Congress was imposing on the United States attorneys a specific additional duty, something beyond their existing general duties. This additional duty is to act,

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not alone on their own knowledge and judgment, but on the basis of an affidavit of good cause furnished by private citizens.

Concluding that the statute was designed to cut down the power of United States attorneys to act (R. 15–16), the district judge held that the filing of the affidavit was a procedural requirement essential to maintaining the denaturalization action. Since the premise cannot be sustained, his conclusion falls with it. It begs the point at issue to say that the procedural requirements of the statute must, under the decision in *Bindczyck* v. *Finucane,* 342 U. S. 76, be fully met. In *Bindczyck* there was no consideration of what were all the procedural requirements of the section, since it was there conceded that none of the statutory requirements had been met. However, here the issue is whether the affidavit is, by the statute, made a jurisdictional or procedural condition precedent to the maintenance of the action. Cf. *Sullivan* v. *United States,* 348 U. S. 170, 171–174. As already pointed out, the structure of the statute relates the affidavit to the duty to act, and not to the procedural requirements of the action itself. Since in that structure the provision has a clear and definite meaning, there is no reason to interpret it as requiring something else which it does not in any way purport to require.

The construction insisted upon in the decision below is one which could so easily and clearly have been made explicit in the statute, that the

face of the enactment is eloquent in its very omission. If it had been the purpose of Congress to require an affidavit in the proceeding itself, rather than as a mandate to the United States attorney, it would have been simple draftsmanship explicitly so to provide. It would have been necessary merely to state the requirement: "the affidavit shall be filed with the complaint". Or, if the purpose were truly, as assumed below (R. 18), to furnish some sort of additional document to the defendant, it would have been necessary only to add to the notice requirement a provision for filing and serving of a copy of the affidavit.

In a very early Senate proposal (discussed *infra,* pp. 22–24, in connection with the legislative history) in which it was sought not only to require the United States attorney to act but also to require the judge to act, it was provided that the United States attorney should be under a "duty" to act when "informed in and by the affidavit of a credible person" of the unlawfulness of the naturalization, and then, specifically, that the judge should be under a "duty" to enter a show-cause order "on filing" of the affidavit aforesaid. There was thus proposed language making the distinction between the mere furnishing of an affidavit to the United States attorney to require action by him, and the actual filing of an affidavit as a requisite part of the court proceeding itself. The instant enactment has clearly taken over the first part of this early provision by requiring the

United States attorney to act when supplied with a proper affidavit. Just as clearly, the enactment has omitted any effort to issue a mandate to a judge to act, and with this omission has likewise dropped the filing requirement. We submit this early proposal for its contrast, and to point up how the statute itself establishes a gap fatal to respondent's contentions by the patent and total omission of each and all of the many simple and available wordings which would have been normally used if the congressional purpose had been to make the affidavit a part of the judicial proceeding. The omission is conclusive of both purpose and effect—the affidavit is only a condition when it is sought to require the United States attorney to act upon outside mandate.

Moreover, the affidavit has no real function as a procedural step in the action which the statute requires the United States attorney to institute. As noted above, the affidavit is obviously not intended to be a duplication of the matters set out in the complaint; the "good cause" for bringing the action must necessarily appear from the complaint itself. The District Court in this case seems to have been of the view that the defendant in the action should have the right to test the sufficiency of the affidavit, stating that "the protection afforded by the requirement of an affidavit of good cause would be seriously impaired if the defendant in a denaturalization action could not examine it and test its sufficiency by motion be-

fore trial" (R. 18). But it is very unlikely that Congress ever intended that there should be in effect two trials of the issues of fact—one in the guise of a determination as to whether there is good cause for instituting the action, and another the actual trial itself. Furthermore, the statutory language here involved first appeared in 1906 (see *infra*, pp. 24–30) when pre-trial proceedings generally were more limited than under present practice, thus fortifying this conclusion. If the affidavit is not to be the subject of some such pre-trial procedure, then there is no purpose in requiring it to be filed with the complaint. The failure of Congress to include the affidavit requirement in the portion of the statute setting forth the procedural requirements for denaturalization actions (see *supra*, pp. 10–11) is, therefore, quite understandable. Congress did not make it a procedural requirement because it had no procedural function, once the United States attorney takes formal action either on the basis of the affidavit furnished him or on the basis of his own knowledge or information.

It is significant that the language of the statute has itself apparently sufficed as a basis for the decisions and utterances which, in marked preponderance, have been of the view that the affidavit constitutes no jurisdictional or procedural requirement. Legislative history has not been adduced as a necessary support in these cases.[5]

[5] *Schwinn* v. *United States*, 112 F. 2d 74 (C. A. 9), affirmed, 311 U. S. 616 (the position of the Court of Appeals that the

Nor has the legislative history been invoked in any of the few, very early, decisions or statements cited to contrary effect in the opinion below.[6]

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affidavit was not a jurisdictional requisite (112 F. 2d at 74–75) was not challenged in this Court—both fraud and illegal procurement had been charged and this Court affirmed on the sole ground of illegal procurement); *United States* v. *Tuteur*, 215 F. 2d 415 (C. A. 7); *United States* v. *Knight*, 291 Fed. 129 (D. Mont.), affirmed, 299 Fed. 571 (C. A. 9); *United States* v. *Collins*, 131 F. Supp. 545 (S. D. N. Y.); *United States* v. *Shinkevich*, 131 F. Supp. 547 (E. D. Pa.); *United States* v. *Jerome*, 115 F. Supp. 818 (S. D. N. Y.); *United States* v. *Lustig*, 110 F. Supp. 806 (S. D. N. Y.); *United States* v. *Schuchhardt*, 48 F. Supp. 876 (N. D. Ind.); *United States* v. *Leles*, 227 Fed. 189 (N. D. Cal.), proceeding sustained on the merits, 236 Fed. 784 (N. D. Cal.); *United States* v. *Radzie*, 14 F. R. D. 151 (S. D. N. Y.); *United States* v. *Favorito*, 7 F. R. D. 152 (N. D. Ohio). Also to the same effect, but unreported: *United States* v. *Ronch*, S. D. N. Y., Civ. Div. 77–290 (1953); *United States* v. *Leo Fischer*, N. D. Ill., No. 54 C 614, March 2, 1955; *United States* v. *Celia Miller*, N. D. Cal., March 24, 1955; *United States* v. *Hyman Kaplan*, D. Conn., Civ. Action 3,509, March 28, 1955; *United States* v. *Mankin*, W. D. Pa., C. A. #10,934; *United States* v. *Stefena Brown* (E. D. Mich.), Civ. No. 12,628, Feb. 15, 1955. Also cf. *United States* v. *Chandler*, 132 F. Supp. 650, 652–654 (D. Md.).

[6] *Cohen* v. *United States*, 38 App. D. C. 123 (C. A. D. C.), decided in 1912; *United States* v. *Salomon*, 231 Fed. 928 (C. A. 5), decided in 1916; *United States* v. *Richmond*, 17 F. 2d 28 (C. A. 3), decided in 1927; Letter of Attorney General Bonaparte, March 26, 1907 (unpublished, National Archives) (App. *infra*, pp. 50–51); and Van Dyne, *A Treatise on the Law of Naturalization* (1907) 138. In addition, the district judge below cites *United States* v. *Candela*, 131 F. Supp. 249 (S. D. N. Y.), (which in turn cites and adopts, in its supplemental opinion on rehearing, the reasoning of the instant case).

In sum, the statutory language on its face, the structure of the section, and its manifest purpose, all support the view that the provision relating to the use of an affidavit imposes a duty on United States attorneys to institute proceedings upon the basis of the affidavit and that it was not designed to establish and does not relate to the jurisdictional or procedural aspects of the action itself.

B. THE LEGISLATIVE HISTORY OF THE STATUTE CONFIRMS THE VIEW THAT THE AFFIDAVIT IS NOT A PREREQUISITE

In dismissing the action brought against respondent, the district judge decided that Section 340 (a)'s reference to a "duty * * *, upon affidavit showing good cause therefor, to institute proceedings" impliedly made the affidavit a required part of every denaturalization proceeding. In so holding, reliance was placed largely upon several facets of the legislative history of the predecessor 1906 statute, which were thought to indicate such an intent.[7]

It is the Government's position, as developed *infra*, pp. 20–41, that the legislative history does not properly support this conclusion of the courts below. Congress did not, either in its initial 1906 denaturalization statute or in the subsequent reenactments, make the affidavit a prerequisite to

[7] As pointed out above at p. 10, the 1906 statute, in so far as directly pertinent, contained identical wording as its two subsequent reenactments, Section 338 (a) of the 1940 Act and Section 340 (a) of the 1952 Act.

bringing and maintaining a denaturalization proceeding. Rather, the history tends to support the conclusion most logically drawn from the language and structure of Section 340 (a) and its predecessor provisions—that the affidavit relates only to the duty of the United States attorneys to act, and is not a jurisdictional or procedural prerequisite.

1. *The 1906 enactment arose out of extensive naturalization frauds, and represented a compromise with bills seeking to allow private citizens themselves to institute denaturalization proceedings*

The Act of June 29, 1906, 34 Stat. 596, 601, was "the culmination of half a century's agitation directed at naturalization frauds, particularly in their bearing upon the suffrage". *Bindczyck* v. *Finucane*, 342 U. S. 76, 79; H. Doc. No. 46, 59th Cong., 1st Sess., pp. 11–12, 21–22; H. Rep. No. 1789, 59th Cong., 1st Sess., p. 2. It had become notorious that huge blocks of immigrants, easily susceptible to bribery and influence, had been naturalized on the eves of elections, with outright contempt for the substantive as well as procedural requirements of naturalization. Moreover, although the power of United States attorneys and of judges to vacate unlawful naturalization orders was recognized and extensively employed, "elections could be influenced by irregular denaturalizations as well as by fraudulent naturalizations". *Bindczyck* v. *Finucane*, 342 U. S. at 82.

Some concern was also apparent that United States attorneys might on occasion be indisposed to exert any great vigor toward denaturalization of voters of their own political party. A district attorney who chose to close his eyes to mass accessions of immigrant votes to his own party could in large part defeat one of the principal purposes of denaturalization legislation by failing to attack the invalid certificates. Thus, it was complained in the report of the Commission on Naturalization appointed by Executive Order on March 1, 1905 (H. Doc. No. 46, 59th Cong., 1st Sess., 27), that the requirement for supervision by federal and state prosecuting attorneys would work irregularly:

> Most [sic] United States attorneys would, it is conceivable [sic], perform this duty, but in State courts it would be at the mercy of attorneys some of whom would be indifferent or negligent. * * * It would be unreasonable to expect prosecuting attorneys to do better, for the [earlier] bill *provided for no supervision over them.* [Emphasis added.]

While the suspicion as to United States attorneys did not reach the surface of extensive open discussion, it could scarcely have been without its influence, and it emerged at least twice, in a converse aspect, with respect to a section relating to the power to appeal an original grant of citizenship. In the remarks of Representative Mann

with respect to possible manipulation of provisions for appeal, the following appeared (40 Cong. Rec. 7767–7768, June 2, 1906):

> [A]n astute district attorney who wanted to carry the election in favor of his side could very easily take an appeal in all cases of men who were going to vote the opposition ticket. And my observation and experience are that these advantages are seldom let go by, and I have not the slightest doubt that that sort of thing would be resorted to * * *.[8]

Comparably, the "advantages" of simply ignoring invalid naturalization seemed to call for some procedure to compel, at the instance of others, the government attorney to do his duty. It is this desire to provide a means to compel the maintenance of denaturalization proceedings that appears to be the explanation for and the purpose of the phrase that, "upon affidavit showing good cause", it should be the "duty" of the United States attorney to institute proceedings.

The agitation with respect to naturalization frauds arose and occasionally subsided in the years before 1906, but its impact was at all times clearly extensive. A noteworthy surge almost to the point of legislation occurred in 1870, of interest here because of the combined similarity and contrast of the proposed legislation with the instant provision.

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[8] And see, to similar effect, the remarks of Representative Lacey (40 Cong. Rec. 7786, June 2, 1906).

The measure presented in 1870 by the Senate Committee on the Judiciary not only made it the "duty" of the United States attorney to institute proceedings, clearly on outside mandate, but also made it the "duty" of the judge to enter a show-cause order. What is of particular interest is that in the first part of the provision—the part adopted in the 1906 legislation—the duty of the attorney to act arose only when he was presented with an affidavit, whereas it was only in the part of the bill that was *not* carried over into the 1906 legislation, *i. e.*, the part seeking to compel *the judge* to act, that there appeared a requirement for "filing" of the affidavit. The proposed section provided (93 Cong. Globe 4835):

> That whenever the district attorney in any district shall be *informed* in and by the affidavit of a credible person setting forth the grounds of the belief of the affiant, that some person therein named has * * * a certificate of naturalization * * * and that he verily believes that such certificate was knowingly procured [unlawfully or is counterfeit] *it shall be his duty* to apply to one of the courts of the United States for such district for an order on the party holding such certificate * * * to show cause why such certificate * * * should not [be held invalid and the citizenship set aside] and thereupon *it shall be the duty of the judge* holding such court, *on filing the affidavit* aforesaid, to grant such order,

> and to give directions for the service thereof on the party, wherever he or she may be, as such judge may deem suitable and proper * * *. [Emphasis added.]

This legislation "died an entirely unrecorded death" in the argument that ensued when Senator Sumner introduced an amendment to naturalize Negroes and orientals. Roche, *Pre-statutory Denaturalization*, 35 Cornell L. Q. 120, 129 (1949). For a period of time congressional interest in specific provisions for denaturalization abated (Roche, *Op. Cit.* 129-137). However, more immediately prior to the instant 1906 enactment, interest in the problem revived and a marked demand developed for a means of assuring denaturalization proceedings when the United States attorney might be indifferent. Such a demand could not be met by a suggestion to citizens to institute the proceedings themselves, for that alternative was not available under the existing authorities, which held that citizens were not proper instigating parties. 3 Moore, *Digest of International Law* (1906), 500; *Pintsch Compressing Co.* v. *Verdin*, 84 Fed. 140, 142 (C. C. D. Mass. 1897); *Commonwealth* v. *Paper*, 1 Brewster 263 (Pa. 1868); *In re Shaw*, 2 Pa. Dist. 250, 252 (1893); *Matter of McCarran*, 8 Misc. (N. Y.) 482; *McCarran* v. *Cooper*, 16 App. Div. 311, 312, affirmed, 162 N. Y. 654 (1900); *Peterson* v. *Texas*, 40 Tex. Civ. App. 175, 177 (1905).

The Commission on Naturalization did not participate in the demand for a means of forcing denaturalization actions; it recommended legislation merely providing, probably unnecessarily, that the United States should have the "power" or the "right" to institute proceedings (H. Doc. No. 46, 59th Cong., 1st Sess., 106, 111).[9] However, the House Committee on Immigration and Naturalization was at the same time confronted with other proposals for legislation in the form of at least three separate bills under which "any citizen" was empowered to institute proceedings.[10] These bills had been introduced in December 1905 and January 1906. Thereafter, in February 1906, Mr. Howells, who had theretofore

[9] That power was considered as already in existence and was being extensively exercised. 40 Cong. Rec. 7871.

[10] H. R. 274, 59th Cong., 1st Sess., introduced by Mr. Jenkins on December 4, 1905, and H. R. 8424, 59th Cong., 1st Sess., introduced by Mr. Hayes on December 15, 1905, provided in their sections 7 and 9, respectively:

"That any court which shall have granted a decree of naturalization may, at any time within five years from the date of such decree, on petition presented by an officer of the United States *or any citizen*, or on belief of error on the part of the court, revise and reexamine the same. For this purpose notice shall be given to all parties concerned, by public advertisement or otherwise, as the court may direct, not less than 3 months previous to an actual judicial inquiry. If upon such examination it shall appear to the court that the decree of naturalization has been surreptitiously obtained, or that any fraud has been perpetrated, or that wilful irregularity, omission or disregard of any of the provisions of the law has taken place, the decree of naturalization shall be rescinded or reversed, and such decree shall be utterly null and void, and any certificate of such naturalization which

introduced bills [11] which were devoid of any indication of any action or affidavit by outsiders, and which substantially followed the recommendations of the Commission, introduced the first draft of H. R. 15442, 59th Cong., 1st Sess. It was in this draft that the language concerning an affidavit first appeared. The language of the earlier Commission drafts speaking in terms of "power" of the United States to institute proceedings was at first retained in H. R. 15442, but disappeared without comment in a revision of June 5, 1906, when the present language appeared, imposing a "duty" to institute the proceedings. 40 Cong. Rec. 7871, 7874.[12]

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may have been granted shall be delivered up and cancelled." (Emphasis added.)

H. R. 10857, 59th Cong., 1st Sess., introduced by Mr. Waldo on January 8, 1906, was of substantially similar text, employing the above phrase "on petition presented by an officer of the United States of America, or by any citizen, or on belief of error on the part of the court."

[11] H. R. 9964 and H. R. 12860, 59th Cong., 1st Sess., introduced, respectively, on December 21, 1905 and January 23, 1906.

[12] The early draft was as follows: "That the United States shall, upon affidavit made by any credible person, have the power to institute proceedings * * *", while the later draft, duly enacted into law, provided: "That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings * * *."

A change in another portion of the section provided that the proceeding could be brought only in the court of the district in which the defendant resided; theretofore, the district of naturalization had also been available.

Even though there was no specific comment by the legislators on this provision for an affidavit and imposition of a "duty", the purpose seems clear in the changes made by Mr. Howells, the chairman of the House Committee, in substituting the new language for the pallid earlier drafts of the presidential Commission. The imposition of a "duty" to act was no mere restatement of the formerly non-mandatory language. It appears to have been a concession to the multiple and persistent proposals of legislation to compel action upon demand of outside citizens, as evidenced in the three bills introduced by Representatives Jenkins, Hayes, and Waldo (*supra,* pp. 25–26), the substance of which had been incorporated in bills introduced by Representative Jenkins and Senator Platt even in the preceding 58th Congress (3d Sess., H. R. 18594 and S. 7037).

That the demand involved in these bills had its influence is attested in the language of the report that the Committee had had H. R. 274, H. R. 8424, and H. R. 10857, *inter alia,* under consideration; that all the bills had been considered in connection with the drafts proposed by the Commission on Naturalization; and that "the committee has freely drawn from the provisions of all the bills before it in the preparation of the bill herewith submitted" (H. Rep. No. 1789, 59th Cong., 1st Sess., pp. 1, 3).

It is unfortunate that the very brief report of the Committee does not spell out the full history

of the internal discussions. The chronology, however, suggests the following as a reasonable reconstruction of what took place: Mr. Howell's first bills (H. R. 9964 and H. R. 12860) merely placed the proposals of the Commission on Naturalization before the Congress, devoid of any means for compelling any governmental action. Confronted with the repeated demands for granting a right to action by citizens themselves (H. R. 274, H. R. 8424, H. R. 10857, 59th Cong., 1st Sess.; H. R. 18594; S. 7037, 58th Cong., 3d Sess.), Mr. Howells first inserted a provision for an affidavit of "any credible person". This was a first step, albeit a gingerly and reluctant one, toward giving outsiders an opportunity to instigate such an action. It was definitely not incorporated as an additional protective measure for the benefit of the naturalized citizen. Sufficient protection had been deemed afforded the defendant in such action by the ample notice and favorable venue provisions; nothing more had been provided the putative defendant in the whole series of bills from the Commission drafts onward (H. Doc. No. 46, 59th Cong., 1st Sess., 106, 111; H. R. 9964, Sec. 34, and H. R. 12860, Sec. 2, Fifth, 59th Cong., 1st Sess.).

However, if there could be doubt of the purpose, Mr. Howells' second change clarified the matter, possibly on pressure of such as Representatives Jenkins, Hayes, and Waldo. There was no longer

talk of a "power" to act, but the present, forthright language imposing a "duty". It was with a clause thus clarified as imposing a duty that the provision concerning an affidavit was returned to the Congress. It is that "duty" which has remained.

There is reason to believe that when Mr. Howells sought to combine the Commission drafts with some provision for compelled action, he adapted in condensed form the earlier 1870 draft, described *supra*, pp. 23–24, as an available form for compulsory action, despite the long period of time since the birth and demise of that draft. The similarity of the language indicates strongly that Mr. Howells took the first portion of the early draft—the portion requiring the United States attorney to act upon submission of an affidavit to him—and after a first attempt to substitute "power" to act for the word "duty" (in an apparent bow to the Commission's language), went all the way at last with a "duty" to act upon an affidavit of good cause.[13] In this connection it is important to note, as observed above, that a provision for *court filing* of the affidavit—so conspicuous

[13] The change from an affidavit of a "credible person" to an affidavit "showing good cause" was patently in correction of too slavish and incomplete an adaptation of the early language. The early language had used the phrase "affidavit of a credible person" but had spelled out in detail how the affidavit would show cause (see *supra*, p. 23). Merely taking over the phrase "affidavit of a credible person" was insufficient or at least left a dangerous area for implication.

in the early draft—was regarded as applicable only to the discarded second portion of the early draft (the portion seeking to impose a duty upon a judge) and was omitted from the present legislation.

The force of this legislative history is not impaired by the letter, relied upon by respondent and the district judge below, dated March 26, 1907, from Attorney General Bonaparte (*infra*, pp. 30–31). The letter is sought to be adduced as an authoritative administrative interpretation (Br. in Opp. 3; R. 17–18), but it appears, instead, in the full context of the correspondence, appended *infra* (Appendix, pp. 43–59) as a somewhat hasty reply to a departmental inquiry of the Department of Commerce and Labor in the single case of a specific improperly naturalized person. Moreover, the letter itself is at best of questionable clarity, makes no reference whatsoever to the legislative history, and does not indicate whether the affidavit is to be filed in court. Its full text stated:

> The Department has the honor to acknowledge receipt of your letter of March 18th in which you ask whether the filing of an affidavit is necessary to give a United States attorney authority to institute proceedings in any court for the cancellation of a naturalization certificate. It appears to the Department that this is the case. The object of the provision undoubtedly is to protect holders of certificates from annoyance and attorneys from unnecessary

> labor as the result of mere complaints by individuals unable to produce evidence and unwilling to assume the responsibility therefor, as suggested in your letter; but it also seems clear to me that Congress has seen fit to prescribe the method by which this protection to those holding naturalization certificates is to be enforced.
>
> I am, therefore, of opinion that before any United States attorney is authorized to institute proceedings for the cancellation of a naturalization certificate he should be furnished with a proper affidavit on which the proceedings may be based.

In the context of the specific problem—the failure of the Department of Commerce and Labor to furnish any affidavit—it may well be that the Attorney General was saying no more than that the United States attorney should not proceed in the absence of an affidavit from that Department; no reference was made to a filing of the affidavit in court along with the complaint or at any other stage in the judicial proceeding. Cf. *Sullivan* v. *United States*, 348 U. S. 170, 171–174.

This letter was written with only the time for analysis available within the seven days between the inquiry and the reply and without any apparent awareness of the significant legislative history of the enactment. It was paraphrased in the second authority relied upon by respondent and the District Court (Br. in Opp. 4; R. 18), *i. e.*, the Van Dyne text, *op. cit.* p. 138, in which the writer, without explanation, changed the Attorney Gen-

eral's language that an affidavit "should be" furnished, to "must be". Again, no analysis of the legislative history appeared. The same is true of the three decisions constituting the remaining authorities cited by respondent and the District Court, the last of which appeared in 1927 (see, *supra*, p. 18, fn. 6).

This limited and stray thread of authority accumulated no support, as evidenced *supra*, pp. 17–18, fn. 5, in the contrary citations already beginning in 1915 and seemingly unbroken and unquestioned after 1927. While, as also observed *supra*, p. 17, this later and preponderant body of opinion likewise voiced no analysis of the legislative history but seemed content to rest, instead, upon the plain and apparently inescapable effect of the statutory language itself, it does disclose a clear history of administrative practice which assumed that the affidavit was not a jurisdictional or procedural requisite. There could be occasions when the affidavit would be filed in court, if for no other reason than the purpose of anticipating and satisfying more extensive discovery proceedings available to the defense. However, to the extent that Attorney General Bonaparte's remarks are viewed as *requiring* the furnishing of an affidavit—and also to the extent that they are viewed as requiring the filing of the affidavit *in court*—they were widely ignored or rejected, both in the courts and in the executive branch of the government. To borrow the late Mr. Justice

Jackson's expression, there was a clear "surrendering [of] former views to a better considered position" (*McGrath* v. *Kristensen*, 340 U. S. 162, 178). That better considered position is that Congress provided the affidavit as a part only of the provision requiring the United States attorney to act when he would not do so at his own instance. As discussed below, such was the history and effect of the denaturalization statute, as it would have appeared to the legislators who reenacted it in 1940 and in 1952, had they undertaken to examine recent decisions or current practices.

2. *At the time of the 1940 and 1952 reenactments, the weight of authority recognized that the affidavit was not a prerequisite*

Although no enlightening statements of the legislators appear with respect to the reenactments of the instant language in 1940 and 1952, it is of the greatest significance that when the Congress acted with respect to the 1940 and 1952 legislation the decisions and practice were preponderantly to the effect that the statutory language did not require filing of the affidavit in court. See *supra*, pp. 17–18; *Schwinn* v. *United States*, 112 F. 2d 74 (C. A. 9, 1940), affirmed, 311 U. S. 616; *United States* v. *Leles*, 227 Fed. 189 (N. D. Cal., 1915); *United States* v. *Knight*, 291 Fed. 129 (D. Mont., 1923), affirmed, 299 Fed. 571 (C. A. 9); *United States* v. *Schuchhardt*, 48 F. Supp. 876 (N. D. Ind., 1943); *United States* v. *Favorito*, 7

F. R. D. 152 (N. D. Ohio, 1945). The few expressions to the contrary were a quarter of a century and more in the past, by the time of the 1952 enactment, *i. e.*, *Cohen* v. *United States*, 38 App. D. C. 123 (C. A. D. C., 1912); *United States* v. *Salomon*, 231 Fed. 928 (C. A. 5, 1916); *United States* v. *Richmond*, 17 F. 2d 28 (C. A. 3, 1927); letter of Attorney General Bonaparte, March 26, 1907 (unpublished, National Archives), (*supra*, pp. 30–31) (*semble*); Van Dyne, *A Treatise on the Law of Naturalization* (1907) 138.[14]

With this posture of the authorities in 1952, and with the few and doubtful voices that had once treated the affidavit as a jurisdictional or

[14] It may be observed of this latter group of cited views that, as observed *supra*, pp. 17–18, no historical basis was adduced in support of the view that the affidavit was to be a necessary part of the proceedings. The letter of the Attorney General (discussed *supra*, pp. 30–33) was merely a brief answer to an inquiry in a particular case, stating that the United States attorney should be furnished with an affidavit. The Van Dyne text (also discussed *supra*, pp. 31–32) merely paraphrased the language of the Attorney General and adduced, in addition, a State Department practice of questionable significance. The court in *Cohen* v. *United States*, *supra*, in turn, cited the above letter of the Attorney General in deciding that the affidavit was a "condition precedent". In both the *Salomon* and *Richmond* cases, *supra*, the whole thrust of the decisions was that illegal procurement had not been made out, there being no affirmative misconduct and the whole basis of the proceedings having been a mere error of law in the original naturalization proceedings. The affidavit aspect was only seized upon, with little analysis, for an additional make-weight that there was no good cause for the proceedings.

procedural requisite so far removed into the past, it is not unreasonable to assume that the legislators viewed the affidavit as it had been viewed in *Schwinn* v. *United States*, 112 F. 2d 74–75 (C. A. 9):

> This affidavit is not jurisdictional, but merely makes it the duty of the district attorney to proceed.

It is true that when the decision in *Schwinn* v. *United States* came before this Court and was affirmed, 311 U. S. 616, the defendant had abandoned his earlier contention that the affidavit was a jurisdictional requisite. However, there is no reason to believe that this Court ignored the above significant and important statement of the Court of Appeals before it, since the affirmance of the revocation of citizenship would have been extremely unlikely if the strong language of the Court of Appeals with respect to a possibly jurisdictional requirement had been improper. It is to be observed, moreover, that this Court's affirmance on the "sole ground" of illegal procurement did not exclude affirmance of the Court of Appeals' holding as to the affidavit but rather excluded an entirely different point, *i. e.*, the additional ground of fraud charged as a basis for the revocation (O. T. 1940, No. 337, R. 6, 14–16, 74–76).

The state of the law at the time of the 1952 enactment, and the corresponding probable purpose of that legislation, was assuredly not changed

with respect to the affidavit by anything, either specific or implicit, in *Bindczyck v. Finucane*, 342 U. S. 76, decided in November, 1951. That holding, as pointed out *supra*, p. 14, related only to the question whether the proceeding under the instant enactment was intended to be exclusive of other means of revoking citizenship—specifically, exclusive of a naturalizing court's revocation of its own order of naturalization during term time. There was clear non-compliance with conceded requirements of the proceeding under the instant enactment, notably, lack of sixty days' notice. This Court held that the enactment provided the sole and exclusive procedure for revocation of naturalization, but in no respect considered the question of whether an affidavit is a jurisdictional requisite of that proceeding as distinguished from a mere means of requiring action when the United States attorney fails to proceed at his own instance. Absent any reference to or involvement of this point in the decision, it is particularly important to note the warning in the vigorous dissent in *Bindczyck* (342 U. S. at 93) against departures from "normal statutory interpretation"—a caution pertinent here owing to the undue assumptions, based on the *Bindczyck* decision, indulged in by the respondent (Br. in Opp. 5–6) and by the district judge below (R. 15–16).[15]

[15] Even if it were to be assumed that the *Bindczyck* holding somehow warned the legislators of a possible indirect impact

The decisions holding the affidavit not to be a procedural requirement cannot be written off as inconsistent with *Bindczyck* because they sometimes speak of the denaturalization statute as not exclusive of other procedures. What these statements obviously meant, in context, was that the affidavit requirement did not cut down the duty of the United States attorney to act if he himself had good cause. The language of *United States* v. *Knight,* for example, 291 Fed. 129, 130 (D. Mont.), affirmed, 299 Fed. 571 (C. A. 9), which was in turn quoted in *Schwinn* v. *United States,* 112 F. 2d 74, 76 (C. A. 9), did indeed say, "[t]he statute is inclusive, not exclusive", but that phrase was not necessarily overruled in *Bindczyck*, for the phrase related only to the point that the statute "does not preclude public prosecutors from proceeding of their own motion to enforce the laws". The court specifically stated: "It does not appear the suit is upon any [sic] the affidavit of section 15, Act June 29, 1906 (Comp. St. § 4374) but whether the suit could be maintained in absence of statute (*Johannessen* v. *United States,* 225 U. S. 240, 32 Sup. Ct. 613, 56

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of the holding upon the affidavit question, such an effect was terminated by the Congress' prompt abrogation of the effect of the holding itself. While not included in any of the various "omnibus" immigration and naturalization bills introduced in Congress from 1950 to 1952, such a provision was inserted as Section 340 (j) in the statute as finally enacted.

L. Ed. 1066), the affidavit is not jurisdictional". The court in *United States* v. *Leles*, 227 Fed. 189, 190 (N. D. Cal.), relied upon the reasoning heretofore quoted:

> If the disclosures of the affidavit are such as to show "good cause"—that is, facts which, if sustained by proof, would afford ground for revoking the grant of citizenship involved, either for fraud or illegality—it is made his duty to proceed and institute proceedings to have the validity of the grant judicially investigated and determined. When it has accomplished this purpose of putting the wheels of justice in motion, the affidavit would seem to have fulfilled its office, and so far as anything appearing in the act to the contrary, becomes functionless. It is obviously not intended to serve as a pleading, since, in requiring a "suit" to be brought, the statute contemplates the filing of a formal complaint.

In the *Schwinn* case, the Ninth Circuit said, 112 F. 2d at 74–75:

> This affidavit is not jurisdictional, but merely makes it the duty of the district attorney to proceed. The district attorney could institute proceedings of this character sua sponte whenever he had reason to believe that the law had been violated in the respect alleged in the petition.

In short, the major premise of the decisions holding the affidavit non-jurisdictional was that

it was a means of requiring the United States attorney to act at the instance of the outsider, and not a procedural requirement in the action for revocation. This is consistent with the *Bindczyck* decision which holds no more than that, when a United States attorney does act, he must act in conformity with the procedures clearly pertaining to the action itself, as specified in the remaining portions of the statute.

Respondent relies (Br. in Opp. 3) upon a single sentence from *Johannessen* v. *United States,* 225 U. S. 227. Lest it be assumed that the phrase may have induced in the legislators of the 1940 and 1952 reenactments the idea that they were making the affidavit a jurisdictional requisite, we quote the full context in which the proffered phrase appears (225 U. S. at 242–243):

> We do not question that an act of legislation having the effect to deprive a citizen of his right to vote because of something in his past conduct which was not an offense at the time it was committed would be void as an *ex post facto* law. *Cummings* v. *Missouri,* 4 Wall. 277, 321; *Ex parte Garland,* 4 Wall. 333, 378. But the act under consideration inflicts no such punishment, nor any punishment, upon a lawful citizen. *It merely provides that, on good cause shown, the question whether one who claims the privileges of citizenship under the certificate of a court has procured that certificate through fraud or other illegal contrivance,*

> *shall be examined and determined in orderly judicial proceedings.* The act makes nothing fraudulent or unlawful that was honest and lawful when it was done. It imposes no new penalty upon the wrongdoer. But if, after fair hearing, it is judicially determined that by wrongful conduct he has obtained a title to citizenship, the act provides that he shall be deprived of a privilege that was never rightfully his. [Emphasis added.]

Out of this context, respondent extracts the italicized sentence. But this passing remark of the Court is in no sense anything but the most tangential and inconclusive description of the essence or requisites of the denaturalization proceeding, and least of all is it an authority for the requirement of the filing in court of an affidavit in every case, beyond the general requirement, intrinsic in any equitable proceeding, that the proceeding be instituted for good cause. The Court's view of the essence of the proceeding is more properly to be found in another passage of the same decision, in which the approach is less tangential, and in which reference to the affidavit is conspicuous by its absence, notice and venue clearly being considered as the procedural essence (225 U. S. at 239–240):

> Whether the judicial review of a certificate of naturalization should be conducted in one mode or another is a matter plainly resting in legislative discretion. Section 15 of the act of June 29, 1906 (34 Stat.

601), provides for a proceeding in a "court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit," upon fair notice to the party holding the certificate of citizenship that is under attack. No criticism is made of this mode of procedure.

In recapitulation, the legislators of the 1940 and 1952 reenactments, in view of the then current state of the law, were entitled to assume that the language reenacted by them did not make a jurisdictional requirement of the affidavit. The language of the statute, its original purpose, and the existing judicial authority supported the view that the affidavit imposed only a condition requiring a United States attorney to act when he would not do so at his own instance. The affidavit is not, and was never intended to afford, a duplicitous and unnecessary reaffirmation of responsibility and detail reflected by the complaint itself.

CONCLUSION

For these reasons, it is respectfully submitted that the judgment below should be reversed and the case remanded to the District Court.

SIMON E. SOBELOFF,
Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

GRAY THORON,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

L. PAUL WININGS,
General Counsel,
Immigration and Naturalization Service.

DECEMBER 1955.

APPENDIX

HERSCHKOWITZ FRAUDULENT NATURALIZATION CORRESPONDENCE OF 1907

DEPARTMENT OF COMMERCE AND LABOR
Office of the Secretary
Washington

JANUARY 23, 1907.

1506–19.

Hon. CHARLES J. BONAPARTE,
Attorney General.

SIR: Herewith I hand you papers in relation to the fraudulent naturalization of one Isidore Herschkowitz, received here from the State Department, consisting of a certified copy of a despatch, No. 128, December 19, 1906, from the Embassy at Vienna, an extract from the birth records of Homonna, Hungary, with translation, showing the date of his birth, the official record made at Isbugyaradvany, with translation, showing when he emigrated to the United States, and his original application for a passport, dated August 11, 1906, as well as the original certificate of naturalization granted to him by the District Court of the United States in and for the Western District of Pennsylvania, at Pittsburgh, July 23, 1906.

It is apparent from an examination of these papers that the certificate of naturalization was

unlawfully granted to the said Herschkowitz, the same having been secured under the provisions of section 2167 of the Revised Statutes, whereas he was more than eighteen years of age at the time of his arrival in the United States, as shown by his application for a passport and the birth certificate, the latter setting forth that he was born January 24, 1876, and the former that he arrived in the United States November 13, 1895, thus conclusively showing that he was more than eighteen years of age at the time of such arrival. It is therefore requested that the matter be referred to the appropriate United States attorney for such action under section 15 of the naturalization act of June 29, 1906, as may be deemed appropriate.

I have the honor to be, Sir,

Your obedient servant,

/s/ OSCAR S. STRAUS,
Secretary.

R. K. C.

Incl. 9333.
S–M

DEPARTMENT OF JUSTICE

JANUARY 24, 1907.

98433.

JOHN B. VREELAND, Esq.,
United States Attorney,
Newark, New Jersey.

SIR: I enclose herewith certain papers in relation to the alleged fraudulent naturalization of

one Isidore Herschkowitz, for such action as you may deem proper under section 15 of the naturalization act of June 29, 1906.

Respectfully,

_____,

Attorney-General.

Inclosures
13330

DEPARTMENT OF JUSTICE

JANUARY 24, 1907.

98433.

The Honorable the SECRETARY OF COMMERCE AND LABOR.

SIR: I have the honor to acknowledge receipt of your letter of January 23d, transmitting papers in relation to the alleged fraudulent naturalization of one Isidore Herschkowitz.

The case has been referred to the United States Attorney for the district of New Jersey for such action as the facts may warrant.

Respectfully,

_____,

Attorney-General.

DEPARTMENT OF JUSTICE

Office of the United States Attorney,

District of New Jersey,

Newark

MARCH 7, 1907.

A. W. C. 98433.

The ATTORNEY GENERAL,

Washington, D. C.

SIR: Referring to your favor of January 24th last, in which you enclosed certain papers relating to the alleged fraudulent naturalization of one Isidore Herschkowitz, I desire to say that as Section 15 of the Act of June 29, 1906, requires an affidavit showing good cause upon which to base proceedings for the cancellation of a certificate of citizenship fraudulently obtained or illegally procured, I do not see how I can institute proceedings to obtain an order of cancellation, as no affidavit seems to have been obtained or is obtainable, unless one can be secured from the Consul General at Budapest. I notice that this case was called to the attention of the Honorable Secretary of State by Honorable Charles S. Francis, American Ambassador at Vienna.

I am unable to locate the alien, the persons named in the application to the Department of State for a passport not being informed of his whereabouts.

Respectfully,

/s/ JOHN B. VREELAND,

United States Attorney.

DEPARTMENT OF JUSTICE

MARCH 12, 1907.

98433.

The Honorable the SECRETARY OF COMMERCE AND LABOR.

SIR: I have the honor to inform you of the receipt of a letter from the United States Attorney for the district of New Jersey asking that the necessary affidavit provided for in section 15 of the new naturalization act of June 29, 1906, be furnished him in order that he may take proper steps to have the fraudulent naturalization certificate of one Isidore Herschkowitz, canceled. The matter is referred to your Department in order that this may be done.

Respectfully,

_____,

Attorney General.

DEPARTMENT OF JUSTICE

98433.

JOHN B. VREELAND, Esq.,
United States Attorney,
Newark, New Jersey.

SIR: The Department is in receipt of your letter of March 7th, in relation to the alleged fraudulent naturalization certificate of one Isidore Herschkowitz, and has requested the Secretary of Com-

merce and Labor to have the necessary affidavit furnished you.

Respectfully,

_____,

Attorney General.

DEPARTMENT OF COMMERCE AND LABOR

Office of the Secretary

Washington

MARCH 18, 1907.

No. 1506–19.

HON. CHAS. J. BONAPARTE,

Attorney General.

SIR: In response to your letter of the 12th instant, No. 98433, initialed A. W. C., I have to state that there is no one in this Department who is prepared to make affidavit "showing good cause" for the institution of proceedings to set aside and cancel the certificate of citizenship granted to Isidore Herschkowitz by the United States District Court for the Western District of Pennsylvania, July 23, 1906.

If the United States attorney for the district of New Jersey who requests such an affidavit will examine the papers which have been forwarded to him, he will find that the material facts are shown by an authenticated extract from the official birth record of the said Herschkowitz, with translation attached, showing that Herschkowitz was only twenty years of age when he emigrated from Hungary, and thus that he secured naturali-

zation under section 2167 of the Revised Statutes by misrepresentation.

As evidence of "good cause," described in section 15 of the naturalization act of June 29, 1906, it would seem that the authenticated birth record of Herschkowitz and his certificate of naturalization showing the condifions under which it was issued would have all the value of an affidavit.

Upon this point, however, as the United States attorney for the District of New Jersey appears to have accepted a construction of the said section which makes his duty, and perhaps his authority, to institute proceedings in any court for the cancellation of a naturalization certificate dependent exclusively upon the filing of an affidavit in each case, rather than that the purpose of requiring such affidavit was to protect the holders of certificates of naturalization from annoyance and the said attorneys from unnecessary labor as the result of mere complaints by individuals unable to produce evidence or unwilling to assume the responsibility therefor, an expression of your views is asked as to whether the said section 15 relieves the United States attorney of the necessity of proceeding thereunder to secure the cancellation of a certificate on the ground that it was fraudulently or illegally procured, or renders such proceeding on his part unlawful unless in each instance an "affidavit showing good cause therefor" is first submitted, irrespective of the character of other evidence adduced for that purpose.

I have the honor to be, Sir,
Your obedient servant,
/s/ OSCAR S. STRAUS,
Secretary.
R. K. C.

Dic. S.

DEPARTMENT OF JUSTICE

98433. MARCH 26, 1907.

The Honorable the SECRETARY OF COMMERCE AND LABOR

SIR: The Department has the honor to acknowledge receipt of your letter of March 18th in which you ask whether the filing of an affidavit is necessary to give a United States attorney authority to institute proceedings in any court for the cancellation of a naturalization certificate. It appears to the Department that this is the case. The object of the provision undoubtedly is to protect holders of certificates from annoyance and attorneys from unnecessary labor as the result of mere complaints by individuals unable to produce evidence and unwilling to assume the responsibility therefor, as suggested in your letter; but it also seems clear to me that Congress has seen fit to prescribe the method by which this protection to those holding naturalization certificates is to be enforced.

I am, therefore, of opinion that before any United States attorney is authorized to institute proceedings for the cancellation of a naturaliza-

tion certificate he should be furnished with a proper affidavit on which the proceedings may be based.

Respectfully,

_____,

Attorney General.

DEPARTMENT OF COMMERCE AND LABOR

Office of the Secretary

Washington

APRIL 15, 1907.

1506–19.

HON. CHARLES J. BONAPARTE,

Attorney General.

SIR: In view of the recent decision of your Department that before a United States attorney is authorized to institute proceedings for the cancellation of certificates of naturalization under section 15 of the act of June 29, 1906, he should be furnished with an affidavit as provided by said section upon which to base the proceedings, it is requested that the papers in the case of Isidore Herschkowitz, forwarded to your Department under cover of letter dated January 23d, last, be returned to this Department in order that, if possible, such an affidavit may be procured.

I have the honor to be, Sir,

Your obedient servant,

[S] LAWRENCE O. MURRAY,

Assistant Secretary.

S. R. K. C.

DEPARTMENT OF JUSTICE

APRIL 17, 1907.

98433.

JOHN B. VREELAND, Esq.,
United States Attorney,
Newark, New Jersey.

SIR: Referring to your letter of March 7th last, in regard to the matter of the cancellation of the certificate of citizenship issued to one Isidore Herschkowitz, the Department requests the return of all the papers appertaining thereto, in order that the affidavit you have requested may be prepared.

Respectfully,

———— ————,
Attorney General.

DEPARTMENT OF JUSTICE

APRIL 19, 1907.

98433

The Honorable the SECRETARY OF COMMERCE AND LABOR.

SIR: In compliance with the request contained in your letter of the 15th instant, I beg to send you herewith the papers in the case of Isidore

Herschkowitz, charged with having procured his certificate of naturalization fraudulently.

Respectfully,

_____,

Attorney General.

Inclosures.
14229.

DEPARTMENT OF COMMERCE AND LABOR
Office of the Secretary
Washington

MAY 8, 1907.

1506–19.

Hon. CHARLES J. BONAPARTE,
Attorney-General.

SIR: Inclosed herewith I hand you the papers in the case of Isidore Herschkowitz, forwarded to you under cover of the letter of this Department dated January 23d, last, and returned by you on the 19th ultimo, as requested, to permit of the furnishing of the statutory affidavit upon which to base proceedings under section 15 of the act of June 29, 1906, having in view the vacation of the order of court conferring citizenship upon Herschkowitz and the cancellation of the certificate of naturalization issued thereon.

The papers referred to consist of a certified copy of a despatch, No. 128, from the Embassy at Vienna, dated December 19, 1906; a record in the Hungarian language made November 30, 1906, by the Circuit Court of Izbugyaradvany,

with translation; an application for a passport by Herschkowitz, executed August 11, 1906; an extract from the Israelite birth record of Homonna for 1876, with translation; and a certificate of naturalization issued by the District Court of the United States in and for the Western District of Pennsylvania, at Pittsburg, July 23, 1906; also an affidavit of Gaillard Hunt, Chief of the Passport Bureau of the Department of State, dated May 4, 1907, as to the genuineness of the above documents, all of which tend to show that the said Herschkowitz was unlawfully naturalized, having been more than eighteen years of age at the time of his arrival in the United States, whereas naturalization was obtained under section 2167 of the Revised Statutes, relating to aliens who came to this country previous to becoming eighteen years of age.

It is therefore requested that the matter be referred to the proper United States attorney for such action under section 15 of the act of June 29, 1906, as may be deemed appropriate.

I have the honor to be, Sir,

Your obedient servant,

/s/ OSCAR S. STRAUS,
Secretary.

R. F. G.

Incl. 935.
S–W.

DEPARTMENT OF JUSTICE

MAY 9, 1907.

98433.

The Honorable the SECRETARY OF COMMERCE AND LABOR.

SIR: I have the honor to acknowledge receipt of your letter of the 8th instant, returning the papers in the naturalization case of Isidore Herschkowitz together with the affidavit requested by the United States Attorney for the district of New Jersey in order that proceedings might be instituted for the cancellation of the Certificate of Herschkowitz.

Respectfully,

_____,

Attorney General.

DEPARTMENT OF JUSTICE

MAY 9, 1907.

98433.

JOHN B. VREELAND, Esq.,
United States Attorney,
Newark, New Jersey.

SIR: The Department sends you herewith the papers in the naturalization case of Isidore Herschkowitz, the affidavit you requested, having been executed and appended thereto.

Please take the necessary steps to secure the cancellation of the certificate of Herschkowitz.

Respectfully,

_____,

Attorney General.

Inclosures
18022.

DEPARTMENT OF JUSTICE

Office of the United States Attorney

District of New Jersey

Newark

JUNE 4TH, 1907.

A. W. C. 98433.

The ATTORNEY GENERAL,

Washington, D. C.

SIR: I have filed a petition in the United States District Court for this District to set aside and cancel the certificate of citizenship of Isidore Herschkowitz. I placed in the hands of the Marshal a notice as required by Sec. 15 of the Act of June 29, 1906, Chap. 3592, 34 Stat., page 601, and he informs me that the defendant has left the country and gone back to Europe. The act says "And if the holder of such certificate be absent from the United States or from the District in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the state or the

place where such suit is brought." We have no practice in this state by which summons can be served by publication, but in our procedure in equity, notice can be given by publication to absent defendants, such publication to be made in a newspaper once a week for four weeks, or five insertions. As the proceeding in this case is in its nature an equitable one, I presume that following our equity practice will answer all purposes. I do not know just what it will cost to publish the notice in a newspaper, but the fees are fixed by the laws of the state, and I write for authority to incur the necessary expense.

Respectfully,

/s/ JOHN B. VREELAND,
United States Attorney.

[Handwritten memo:]
Captn. GLOVER: Please authorize this.

/s/ RIDGELY.

DEPARTMENT OF JUSTICE

JUNE 7, 1907.

98433.

J. B. VREELAND, Esq.,
United States Attorney,
Newark, N. J.

SIR: Replying to your letter of the 4th instant, you are hereby authorized to incur the expense of publishing the notice required by section 15 of the act of June 29, 1906, in the proceedings to set aside and cancel the certificate of citizenship of Isidore Herschkowitz.

The account should be rendered in accordance with paragraph 916 of the Instructions dated April 1, 1904, and forwarded to this Department for settlement.

Respectfully,

_____,

Attorney General.

William L. Penfield Walter S. Penfield

Cable Address "Intlaw Washington"

PENFIELD & PENFIELD

Attorneys and Counselors at Law

213–216 Colorado Building

Washington, D. C.

SEPTEMBER 21, 1907.

The Honorable the ATTORNEY GENERAL.

SIR: If the courtesy may be properly accorded, I should be thankful if the Department of Justice would kindly furnish me a copy of its letter to the Department of Commerce, dated March 26 last, with reference to the institution of proceedings to set aside naturalization certificates on the filing of a proper affidavit showing good cause therefor.

I am, sir,

Your obedient servant,

(Signed) W. L. PENFIELD.

DEPARTMENT OF JUSTICE

SEPTEMBER 26, 1907.

W. L. PENFIELD, Esq.,
213–216 Colorado Building,
Washington; D. C.

SIR: In accordance with the request contained in your letter of the 21st instant, I send you herewith a copy of the Department's letter upon the matter of the requirement of an affidavit upon which to base proceedings for the cancellation of fraudulent naturalization certificates.

Respectfully,

_____,
Attorney General.

Inclosure.
19896.

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No. 213

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, PETITIONER

v.

ETTORE ZUCCA, ALSO KNOWN AS MARIO SARNI, ALSO KNOWN AS ETTORE SARNI ZUCCA

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

SIMON E. SOBELOFF,
Solicitor General,
J. F. BISHOP,
Attorney,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1955.

No. 213

UNITED STATES OF AMERICA, PETITIONER

v.

ETTORE ZUCCA, ALSO KNOWN AS MARIO SARNI, ALSO KNOWN AS ETTORE SARNI ZUCCA

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

Pursuant to the request of the Court during the oral argument of this case, we furnish the following information:

1. Circular No. 3663 of the Department of Justice, Supp. No. 9, dated April 6, 1943, provides in full text as follows:

TO ALL UNITED STATES ATTORNEYS

Re: Denaturalization

There has been prepared and the mimeographing just completed of a compendium of legal theories and precedent, problems of

pleading and practice, and matters of policy and procedure pertinent to cases within the denaturalization program. A copy is enclosed for the assistance of your office. This compilation represents extensive research and has been prepared with the realization that denaturalization cases based on mental reservation present problems which may be new to some of the United States Attorneys inasmuch as there have been few cases of this type tried in most districts. It is intended that this compilation be available for reference, and at the same time it is believed highly important that the attorneys handling denaturalization cases be thoroughly familiar with the theories, precedent and problems contained in this compilation in order to prepare and present the cases with the greatest effectiveness.

FRANCIS BIDDLE,
Attorney General.

The memorandum referred to is a document of 158 pages. The pertinent portions relating to the affidavit are as follows:

* * * * *

C. Affidavit:

8 U.S.C. § 738 provides for an affidavit in the institution of proceedings to cancel citizenship. It has been held, however, that the affidavit is not jurisdictional and that the United States Attorneys may institute proceedings

upon their own initiative. *Schwinn* v. *United States*, 112 F. (2) 74 (C.A.A. 9th, 1940), affirmed 311 U.S. 616; *United States* v. *Leles*, 227 Fed. 189 (N.D. Calif., 1915); *United States* v. *Knight*, 291 Fed. 129 (D.C. Mont., 1923), affirmed 299 Fed. 571 (C.C.A. 9th, 1924).

In the *Leles* case, the court said that the purpose of the affidavit was to put "the wheels of justice in motion." That court also said that it was not intended to be a pleading and therefore need only set forth "the substantive matter required * * * however informally or inartificially stated." The court also said that the facts might be stated upon information and belief in an affidavit of this character.

But where an affidavit is submitted, it must set forth facts showing good cause for cancellation of citizenship. Two Circuit Courts of Appeals have affirmed decrees for the defendants in suit where the affidavits were deemed insufficient. *United States* v. *Richmond*, 17 F. (2) 28 (C.C.A. 3d, 1927); *United States* v. *Salomon*, 231 Fed. 928 (C.C.A. 5th, 1916).

In *United States* v. *Ali*, 7 F. (2d) 728 (E.D. Mich., 1925), the petition recited that it was based on the affidavit of a United States examiner, which was signed and sworn to before the filing of said petition, and was filed after the filing of the petition. The court said in that case that it would have been better practice to file the affidavit or a copy thereof, on which the petition was based, as a part of the petition.

As indicated below in "IV. Pre-Trial Procedure", the defendant can probably obtain most of the government's evidence by a proper utilization of the methods of discovery provided in Rules 16, 33, and 34. It, therefore, may be advisable at the outset to furnish him with a reasonable amount of the government's evidence in order to reduce the chance of these discovery rules being employed, and thus avoid the ensuing delay. If this is done, it would seem that the affidavit rather than the complaint is the proper place in which to recite evidence.

In the event it is decided in a given case to furnish the defendant with some of the government's evidence, it is recommended that an affidavit be prepared and served with the complaint and that in the affidavit there be recited briefly the nature of the evidence to be relied upon. This recitation of evidence should be of a general nature but sufficient to reduce the ordinary chance of the discovery rules being employed and at the same time to reduce the likelihood of the government having to oppose a motion for a bill of particulars. On the other hand, it should not be so complete as to provide the defendant with the names of witnesses and possibly can be so phrased as not to disclose their identity. Similarly, it may be disadvantageous to make it so complete as to identify specific instruments or writings, for this may increase the likelihood of a demand

for their production under Rule 34. It would seem sufficient to set out the general substance or type or statements or writings known to have been made without quoting them. It would also seem proper to aver generally membership and leadership in the German-American Bund or other un-American organizations, refusal of military service, general propaganda activities, etc.

If it is believed undesirable to attach an affidavit to the complaint and to serve it upon the defendant, as discussed above, in that instance no reference should be made in the complaint to an affidivit having been prepared and as constituting the basis of the action.

A prior Circular No. 3663 of the Department of Justice, Supp. No. 1, dated May 29, 1942, provides in pertinent text as follows:

To All United States Attorneys:

The following information and suggestions are furnished for any assistance they may be to you with respect to cases in your district to cancel naturalization certificates upon the grounds of mental reservation and lack of attachment to the United States Constitution demonstrated by disloyal and un-American statements, writings and conduct.

* * * * *

We have not prepared a form of the affidavit mentioned in Section 738, Title 8, United States Code, and have not included in the complaint an allegation with respect thereto for the reason that it appears the affidavit is not a jurisdictional matter and its form and inclusiveness may vary widely. It should be noted in cases of the type mentioned herein that the Immigration and Naturalization Service is not preparing the affidavits, it being expected that such affidavits, as well as the complaints, will be prepared in your office.

Inasmuch as the Federal Bureau of Investigation is conducting the active investigation in these cases and accordingly will be developing the major portion of the evidence on which the proceedings are based, a Special Agent of the Federal Bureau of Investigation acquainted with the facts will be in a position to sign the affidavit mentioned in Title 8, United States Code, Section 738.

* * * * *

During recent years, on various occasions, in individual correspondence, the Department has instructed United States attorneys that the affidavit of probable cause supplied by the Immigration and Naturalization Service is not a jurisdictional re-

quirement and in the specific case should not be filed in the proceedings.

2. The Immigration and Naturalization Service of the Department was transferred to the Department of Justice by Reorganization Plan No. V, effective June 14, 1940 (54 Stat. 230, 1238).

3. With respect to the number of denaturalization proceedings instituted, the following table is based upon the tabulations in the Annual Reports of the Administrative Office of the United States Courts, Table C-2, "Civil Cases Commenced in the United States District Courts; United States cases, United States plaintiff; Enforcement of Federal Statutes, Denaturalization." We are informed by Mr. Thiel of the Administrative Office that the classification "Denaturalization" includes all denaturalization proceedings brought by the United States under Section 340 of the Immigration and Nationality Act of 1952, and predecessor provisions, and may also include the few other cases involving loss of nationality (*e.g.*, expatriation) which are brought by the United States as plaintiff. We are indebted to Mr. Thiel for the figure for the fiscal year 1955 from the preliminary draft of the Annual Report, September, 1955.

Fiscal Year	Total	Districts	District of Columbia	Alaska, Canal Zone, Guam and Virgin Islands
1955	557	555	1	1
1954	333	331	1	1
1953	317	316	1	—
1952	272	268	4	—
1951	611	611	—	—
1950	605	605	—	—
1949	253	250	3	—
1948	350	348	—	2
1947	132	130	1	1
1946	215	215	—	—
1945	200	200	—	—
1944	226	221	2	3
1943 [1]	710	706	2	2
1942 [1]	360	354	2	4
1941 [2]	949	942	3	4

[1] Table 6 instead of Table C–2.
[2] Table 7 instead of Table C–2.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
J. F. BISHOP,
Attorney.

JANUARY, 1956.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956 374021 927

The requirement of an affidavit of good cause was again recognized in *United States* v. *Salomon,* 231 Fed. 928 (5th Cir. 1916), where the Court said:

> "The district attorneys are authorized to institute the proceedings only 'upon affidavit showing good cause therefor.'" (p. 929)

This language was quoted with approval in *United States* v. *Richmond,* 17 F. 2d 28, 33 (3d Cir. 1927). See also Van Dyne, *A Treatise on the Law of Naturalization of the United States* (1907), page 138.

These decisions were in accord with the legislative history of the statute, which is set forth in the District Court's opinion (A. 18-20, 24-25).

Moreover, the requirement of an affidavit of good cause is consistent with the usual requirement of a preliminary showing of merit to reopen a judicial decree, particularly in a matter of such great importance as United States citizenship. Cf. *Schneiderman* v. *United States,* 320 U. S. 118, 122 (1943).

II

The cases cited by the Government as conflicting with the decision below do not justify a grant of certiorari.

The cases which have held, contrary to the decisions cited in Point I, that an affidavit of good cause is not necessary, represent a recent aberration, which will probably not continue, now that the Court below has made clear the history and purpose of the statute and its interpretation.

We may lay to one side the district court cases cited by the Government (Petition, p. 5), since conflict with district court cases is not an express consideration governing review on certiorari (Supreme Court Rule 19, subd.

1(b)). Many are in the Southern District of New York and would no longer be followed in view of the holding in the Court below. We simply note that there are other district court decisions recognizing the necessity of an affidavit of good cause. *United States* v. *Candela*, 131 F. Supp. 249 (S. D. N. Y. 1954); *United States* v. *Hartmann*, 2 F. R. D. 477 (E. D. Pa. 1942).

Of the two court of appeals cases cited by the Government (Petition, p. 4), the earlier one would probably not be followed today in the Court which decided it, and the later one simply cited that decision as authority.

Schwinn v. *United States*, 112 F. 2d 74 (9th Cir. 1940), affirmed on other grounds in 311 U. S. 616, is the earlier of the two cases. It did not involve the necessity for an affidavit of good cause, since such an affidavit was filed with the complaint (Petition, p. 4, n. 1); the argument went only to the necessity of the District Attorney presenting the affidavit in evidence at the trial (112 F. 2d at 75). In holding that the affidavit was not jurisdictional, the Court reasoned that the district attorney could institute denaturalization proceedings *sua sponte*, and that "The statute is inclusive, not exclusive, and * * * does not preclude public prosecutors from proceeding of their own motion to enforce the laws" (112 F. 2d at 76), citing *United States* v. *Knight*, 294 Fed. 129, 130 (D. Mont. 1923). Subsequently, this Court removed the express ground of the *Schwinn* opinion by holding that the denaturalization statute is the *exclusive* procedure for revoking a naturalization certificate. In *Bindczyck* v. *Finucane*, 342 U. S. 76, 83 (1951), this Court stated

> "* * * we cannot escape the conclusion that in its detailed provisions for revoking a naturalization because of fraud or illegal procurement not appearing on the face of the record, *Congress formulated a self-contained, exclusive procedure.* With a view to protecting the Government against fraud while safeguarding citizenship from abrogation except by a

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 213

UNITED STATES OF AMERICA,
Petitioner,

against

ETTORE ZUCCA, also known as MARIO SARNI,
also known as ETTORE SARNI ZUCCA,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ORRIN G. JUDD,
Attorney for Respondent.

EARLE K. MOORE,
Of Counsel.

August 24, 1955

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IN THE

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No. 213

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Respondent (defendant in the denaturalization proceeding below) believes that the judgment of the United States Court of Appeals for the Second Circuit was correct, and that there is no necessity for this Court to review it on certiorari.

Respondent accepts Petitioner's statement concerning the facts, the opinions below, the jurisdiction of the Court, the question presented and the statute involved.

The complaint, seeking to revoke a naturalization certificate issued to defendant in 1944 (R. 3), charges him

with willful concealment of material facts concerning his alleged membership in the Communist Party "including the Workers Communist Party and other organizations affiliated with or controlled by the Communist Party" until 1947 (R. 5). Trial of the issues presented by the complaint would involve a detailed review of defendant's life history, political beliefs, and moral character, as well as the background of numerous unspecified organizations, and impose on defendant considerable burdens of investigation and legal defense. It is fair that he should be spared these burdens if the complaint against him does not conform with the requirements laid down by Congress.

I

The decision below was in accordance with the contemporaneous interpretation of the denaturalization statute.

The Court of Appeals, affirming a judgment of the District Court for the Southern District of New York, held that an action to cancel an order of naturalization could not be brought without an affidavit of good cause under Section 340(a) of the Immigration and Nationality Act of 1952 (8 U. S. C. A. §1451(a)).

The statute provides that:

> "It shall be the duty of the United States district attorneys for the respective districts *upon affidavit showing good cause therefor*, to institute proceedings in any court specified in subsection (a) of Section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the

> order admitting such person to citizenship and canceling the certificate of naturalization . . ." (Italics added).

This language, derived from Section 15 of the Act of June 29, 1906 (34 Stat. 596, 601), was authoritatively interpreted at the time as making the affidavit of good cause a prerequisite to the institution of an action. The Attorney General of the United States, on March 26, 1907, advised the Secretary of Commerce and Labor that:

> "I am therefore of opinion that before any United States Attorney is authorized to institute proceedings for the cancellation of a naturalization certificate, he should be furnished with a proper affidavit on which the proceedings may be based." (Quoted in Appendix to Petition at A. 25-26.)

The United States Court of Appeals for the District of Columbia Circuit upheld this principle in a decision in 1912, stating that:

> "Congress was not unmindful of the value of a certificate of citizenship, and, in providing the remedy, coupled therewith the condition that an affidavit should be presented to the district attorney, stating the facts necessary to the maintenance of the suit." (*Cohen* v. *United States*, 38 App. D. C. 123, 126.)

In 1912 this Court stated of the Act:

> "It merely provides that, on good cause shown, the question whether one who claims the privileges of citizenship under the certificate of a court has procured that certificate through fraud or other illegal contrivance, shall be examined and determined in orderly judicial proceedings." *Johannessen* v. *United States*, 225 U. S. 227, 242.

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OCTOBER TERM 1955

No. 213

UNITED STATES OF AMERICA,

Petitioner,

v.

ETTORE ZUCCA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT

ORRIN G. JUDD,
Attorney for Defendant.

MORRIS A. WIRTH,
EARLE K. MOORE,
IRWIN M. ROSENTHAL,
of Counsel.

clearly defined procedure, Congress insisted on the detailed, explicit provisions of § 15.'"* (Italics added)

The most recent case in the Ninth Circuit recognized the rule of the *Bindczyck* case, and decided that the notice provisions of the statute were mandatory, because of the exclusive nature of the Federal statute. *Stenerman* v. *Brownell,* 204 F. 2d 336, 340 (1953). In other words, that Court has abandoned the theory of the *Schwinn* case, that the statute is inclusive rather than exclusive.

The other case cited by the Government as involving a conflict is *United States* v. *Tuteur,* 215 F. 2d 415 (7th Cir. 1954). As Judge Ryan pointed out in *United States* v. *Candela,* 131 F. Supp. 249, 252, *supra,* the determination there was dictum, since the Court of Appeals in reversing the District Court's granting of summary judgment need not have passed upon the necessity of an affidavit. The part of the opinion dealing with the affidavit simply cited the *Schwinn* case (215 F. 2d at 419), without reviewing the history of the statute or discussing the effect of this Court's decision in *Bindczyck* v. *Finucane.*

Not every formal conflict between a court of appeals' decision and prior opinions of another court of appeals compels granting a petition for certiorari. This Court's rule on the subject specifies only that "The following, while *neither controlling* nor fully measuring the court's discretion, indicate the character of reasons which will be considered. * * *" (Rule 19, subd. 1(a), italics added.)

It has been stated that a conflict with a court of appeals' decision which has been discredited or which has lost weight by intervening decisions of the Supreme Court or other courts of appeals will not be ground for certiorari to issue. Stern and Grossman, *Supreme Court Practice,* 1950, page 101 and 2d ed., pages 411-13; see also

---

*Section 15 of the 1906 Act, to which the Court referred, is now Section 340(a) of the Immigration and Nationality Act of 1952 (see pp. 2-3, *supra*).

Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465 (1953). Such procedural questions as may arise in connection with the filing of an affidavit (See Petition, p. 6) may be considered in the lower courts. None is presented on the record in the instant case.

The decision below will not place any serious burden on the United States Attorneys. The discovery provisions of the Federal Rules of Civil Procedure are applicable to denaturalization proceedings. Disclosure of the Government's case must be made before trial in any event, and the decision below merely requires it to be made at the outset.

On the other hand, the requirement of a preliminary showing of good cause will protect naturalized citizens from the harassment and expense of litigation in cases where an adequate preliminary showing cannot be made.

It is not necessary for this Court to review the well-reasoned opinion in the present case in order to make it clear that the interpretation of the denaturalization statute adopted when it was first enacted in 1906 is still valid, and that an affidavit of good cause is a necessary part of a complaint under the statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

ORRIN G. JUDD,
Attorney for Respondent.

EARLE K. MOORE,
Of Counsel.

August 24, 1955.

The 1906 Statute

The Government brief (pp. 2-3) sets forth the material provisions of the Immigration and Nationality Act of 1952 (Sec. 340). Since that section was concededly derived from Section 15 of the Act of June 29, 1906 (34 Stat. 596, 601), we deem it useful to quote at the outset the language of the 1906 Act:

> "Section 15. That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and cancelling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the state or the place where such suit is brought."

We find no substantial difference between this language and that now contained in Section 340. The notice provision, however, follows immediately after the sentence referring to the affidavit showing good cause and restricting the venue instead of being in a separate paragraph as in Section 340.

Summary of Argument

I.

Section 15 of the Act of June 29, 1906 (from which Section 340 derives) establishes an exclusive and carefully safeguarded procedure for denaturalization. To this end it provides that such proceedings may be instituted only by United States attorneys and makes it their duty (a) to base the proceedings upon an affidavit showing good cause, (b) to bring the proceedings in the district in which the defendant resides and (c) to give 60 days notice in place of the usual 20 days.

The intimate textual connection between the affidavit clause and the venue clause clearly indicates that both are procedural requirements for the institution of proceedings. The phrases "upon affidavit" and "in the court" both modify the language "to institute proceedings", and simply tell how and where the proceedings are to be instituted.

If the Government's interpretation were accepted (*i.e.*, that the clause should be read; "upon *receiving* an affidavit, it shall be the duty", etc.) the language must mean that when a United States attorney receives an affidavit he must institute proceedings pursuant to the notice and venue provisions of Section 340, but that if he does not receive one, he is not bound by these procedural restrictions. That meaning, however, is unreasonable. Moreover, all concede that the other two provisions dealing with venue and notice are exclusive.

There would be no reason to make it the duty of the United States attorney to institute proceedings upon receiving an affidavit showing good cause. He had that duty already. Since the section provides no procedure for enforcing the duty, it would add nothing to existing law. The absence of provisions regulating the participation of "out-

sider" complainants in the proceeding indicates that Congress had in mind simply the usual affidavit of good cause which would be used in moving to vacate a judgment for fraud.

II.

Within a year after the Act of 1906 took effect the Attorney General squarely held that the United States attorney should be furnished with an affidavit showing good cause before he was authorized to institute proceedings. His opinion carried added weight, because an Assistant Attorney General had been chairman of the Commission which drafted the statute. The necessity of such an affidavit was repeated in the first judicial interpretation, in 1912, *Cohen* v. *United States,* 38 App. D. C. 123. Subsequent cases generally adopted the same rule. Even the few decisions which the Government cites to the contrary involved proceedings based upon affidavits, with the defendant's attack based on the adequacy of the affidavit rather than its necessity.

The principal case relied on by the Government, *Schwinn* v. *United States,* 112 F. 2d 1244 (9th Cir., 1940) involved a complaint which recited that an affidavit had been furnished, the real issue being whether the affidavit needed to be proved at the trial.

This Court's decision in *Bindczyck* v. *Finucane,* 342 U. S. 76 (1951), holding that Section 15 (now Section 340) was the exclusive method for revoking a naturalization, repudiated the reasoning of the *Schwinn* decision. The contrary cases cited by the Government are for the most part recent District Court cases, not supported by analysis of the statute or its legislative history.

Denaturalization proceedings create serious consequences for a naturalized citizen, by their mere commencement. The contemporaneous interpretation of the Act of 1906, as requiring an affidavit showing good cause, recog-

nized the importance of American citizenship and the necessity for strict protection of anyone whose naturalization was challenged.

III.

At the time the Nationality Act of 1940 was adopted, the weight of authority still upheld the necessity of an affidavit showing good cause. Three out of four circuits in which there had been recorded opinions had treated the affidavit as mandatory.

Before the 1952 reenactment, this Court had decided the *Bindczyck* case, which tends to support the position that the affidavit is mandatory. No contrary case was called to the attention of Congress.

Administrative practice up to 1952 indicates a general use of such affidavits. Any argument based on congressional reenactment of the section indicates approval of the construction urged by respondent here, rather than the reverse.

IV.

The purpose of Congress, in the light of the background of denaturalization proceedings before 1906, was to create a single procedure which would be effective and would safeguard the rights of defendants. The provision for an affidavit of good cause was first inserted in the bill as a qualification on the power to denaturalize, before the bill contained any reference to the district attorney as the person to institute the proceeding. Its initial wording "upon affidavit made by any credible person" was comparable to the requirement for affidavits in support of a petition for naturalization, and indicated a belief that the requirements to support a denaturalization proceeding should be no less strict than those for verification of naturalization petition. The change from language conferring power on the United States to language making denatu-

ralization the duty of the United States attorneys was part of a series of amendments moved by the floor manager of the bill, at the same time that the restriction on venue was introduced in the bill, and without any indication of intention to change the affidavit of good cause from a qualifying requirement to a mere instrument of compelling action by reluctant district attorneys.

There is no showing in the legislative record of any accusation that United States attorneys were lax in bringing denaturalization actions before 1906. On the contrary, they had been over-zealous in some instances. Congress was concerned with protecting aliens, who might be ignorant of our laws and without resources to defend themselves, against default and consent judgments. The notice and venue provisions of the section were intended to make it easier for such persons to appear and defend themselves. The affidavit requirement is similar and should be considered part of the safeguards which Congress imposed for the benefit of naturalized citizens.

V.

The requirement of an affidavit showing good cause constitutes a reasonable precaution for the protection of naturalized citizens. United States attorneys are furnished, in usual course, with affidavits prepared by the Immigration and Naturalization Service, showing whether good cause for denaturalization exists. Requiring them to submit such affidavits for a judicial determination of their sufficiency at the inception of the proceedings will not create any serious burden. The affidavit showing good cause does not involve any duplication of the complaint, but supplies facts which may disclose whether a complaint stated in general language is supported by the basic information which the Government has available. It will not permit duplicate trials because there is no procedure for cross-examination of the deponents or submission of opposing evidence.

Serious harm can result to any individual from placing in public record official charges of fraud. Congress intended to require that the Court be furnished with an affidavit setting forth the facts before proceedings could be instituted for revocation of United States citizenship.

ARGUMENT

POINT I

The language of Section 340 reveals only one meaning consistent with ordinary rules of English usage—that United States attorneys must base denaturalization complaints upon an affidavit showing good cause.

Grammatically, the affidavit is a requirement of a denaturalization suit.

Although the Government concedes (Br., p. 5) that one of the effects of the Act of 1906 was to establish procedural safeguards in denaturalization, it resists the inference that the affidavit of good cause was a procedural safeguard. It asserts instead that "(t)he provision for an affidavit showing good cause is not placed among the procedural requirements" (Br., p. 5) and is "textually unconnected with anything else in the statute" (Br., p. 11). The fact is that the affidavit provision and the venue provision are both part of the same sentence of Section 340(a). They are both adverbial clauses commencing with prepositions (i. e. "*upon* affidavit"; "*in* any court") which modify the same infinitive clause ("to institute proceedings"):

> "It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court . . . in the judicial district in which the

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naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship . . . ."*

The Government apparently agrees (Br., p. 36) that this sentence imposes a requirement that United States attorneys bring any denaturalization proceedings only in the defendant's district of residence. Nevertheless it denies that this sentence imposes a requirement that the proceedings be based upon an affidavit showing good cause. To support such a construction of the sentence, the Government must imply a participle which Congress omitted, i. e., it must read the phrase as "upon *receiving* an affidavit" instead of "upon an affidavit".

However, if the phrase is interpreted as a participial clause it must modify everything in the sentence and, therefore, the entire section. The restriction of venue to the district of residence and the provision for sixty days notice would be applicable only if the United States attorney had received an affidavit. The Government has not cited any case, and we know of none, in which a reluctant United States attorney was forced to institute proceedings by an "outsider" affidavit. Therefore the section would apply to practically nothing. This unreasonable intention should not be imputed to Congress.

The requirements of Section 340 apply to all actions for denaturalization.

The Government apparently contends that a suit brought voluntarily by the United States attorney, and not under compulsion of an "affidavit showing good cause", is brought under some other general power which Congress did not intend to cut down by the Act of 1906 (Br., p.

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* The Government quotes this sentence three times in the course of its argument (Brief, pp. 5, 10 and 19). In each case the second part of the sentence, dealing with venue, is omitted.

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13). This argument meets two difficulties. In the first place, if the power is derived from some other source, it would not be limited by the other procedural requirements of Section 340. In the second place, there is no source of power to bring such an action other than Section 340.

This Court has held and the Government concedes (Br., p. 36) that the notice provision of Section 340 is exclusive. An interpretation which permitted the effect of procedural safeguards to depend upon whether an affidavit was furnished would bring "capricious and haphazard results" (*Cf. Bindczyck* v. *Finucane*, 342 U. S. 76, 85, 1951), and therefore should be avoided. On this point the District Court in the present case said:

> "An interpretation which gives such cavalier treatment to important safeguards insisted on by Congress cannot be sustained" (R. 14).

Not only does the *Bindczyck* case hold that Section 340 is the exclusive source of power to denaturalize, but the present complaint points to no other source. Its first assertion is:

> "1. This is an action under Section 340(a) of the Immigration and Nationality Act, Public Law No. 414, 82d Congress, 2d Session." (R. 2)

Moreover, the summons was based on sixty days' notice (R. 7), rather than the twenty days' notice normally provided in civil actions. In referring specifically to Section 340 of the Immigration and Nationality Act, and providing for sixty days' notice of the action, the Government recognized that the Section applies whether or not the United States attorney has received an affidavit of good cause. Since the purpose of the section is to prescribe a mode of procedure applicable to all cases, the affidavit must be viewed as a procedural requirement.

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The purpose of the affidavit is not to create a duty on the United States attorney. The affidavit is something which the United States attorney has a duty to supply.

It would be unnecessary for Congress to provide that it is the duty of the United States attorneys to institute denaturalization proceedings *when* they are presented with an affidavit showing good cause. The United States attorneys had always been charged with the duty of enforcing all civil proceedings in which the United States is concerned (Gov. Br., p. 13). *Cf. United States* v. *Smith*, 158 U. S. 346, 353 (1895). Unquestionably it was their duty to seek cancellation of fraudulent certificates when advised of the facts, whether by affidavit or otherwise. Section 340 contains no procedure for reviewing the act of the United States attorney who refuses to perform his duty, and would add nothing to preexisting law if its purpose were to require him to act.

The contention that the provision for an affidavit showing good cause related only to actions on the basis of private complaints is inconsistent with the legislative history of the Act as shown below (Point IV). If that had been Congress' meaning, it would have been reasonable to insert provisions concerning the participation of the private citizen in the trial and his method of enforcing the district attorney's duty if action were not promptly instituted on the basis of his affidavit. The succinctness of the section indicates that the Congress did not have in mind a radical new procedure with all the complications and pitfalls which would require legislative consideration. The form indicates instead that Congress had in mind simply the customary affidavit of good cause which is furnished in moving to reopen a judgment.

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The word "upon" indicates that the affidavit is the basis of the action.

The use of the expression, to institute proceedings "*upon* affidavit showing good cause therefor" is consistent with a common form of notice of motion which would be used in moving to vacate an order or judgment for fraud. Although the present official forms of notice of motion are stated differently, it is still common in such a well-known district for naturalization matters as the Southern District of New York, to make a motion "upon" an affidavit. In a lengthy proceeding this is a method of designating the papers to be considered in deciding the motion and to be included in the record on appeal.

Attorney General Bonaparte interpreted Section 15 as requiring that the proceeding be based "upon" an affidavit (Gov. Br., p. 59).

The Government asserts, as evidence that the affidavit is not a procedural requirement, that it would be merely duplicitous reaffirmation of the complaint (Br., pp. 8-9, 11-12, 16, 41). This complaint is sufficiently lacking in detail so that an affidavit of good cause clearly need not be a mere duplication of the formal allegations of the complaint (*supra*, pp. 1-2). On the contrary, such an affidavit can be a real protection for the defendant (*infra*, pp. 44-46).

The language of the section authorizing denaturalization actions shows, consistent with the serious nature and consequences of such an action, that an affidavit of good cause is one of the requirements for the commencement of such an action.

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POINT II

The initial construction of the section, and the weight of authority for over forty years after its enactment, made the affidavit showing good cause a condition precedent to the bringing of a denaturalization action.

Less than a year after the enactment of the Naturalization Act of 1906, the Attorney General interpreted Section 15 as making an affidavit showing good cause a condition precedent to the institution of a denaturalization proceeding. Attorney General Bonaparte stated:

> "The object of the provision undoubtedly is to protect holders of certificates from annoyance and attorneys from unnecessary labor as the result of mere complaints by individuals unable to produce evidence and unwilling to assume the responsibility therefor, as suggested in your letter; but it also seems clear to me that Congress has seen fit to prescribe the method by which this protection to those holding naturalization certificates is to be enforced.
>
> "I am, therefore, of opinion that before any United States attorney is authorized to institute proceedings for the cancellation of a naturalization certificate he should be furnished with a proper affidavit on which the proceedings may be based." (Letter of March 26, 1907, Gov. Br., pp. 50-51).

The Government suggests that this may have been a hasty (and therefore erroneous) opinion by the Attorney General (Br. pp. 30, 31), since it was rendered within eight days after the date of the inquiry. However, this was not the Attorney General's first acquaintance with the statute; and he may well have given thought to the matter over a longer period of time. His letter of March 12, 1907, had asked the Department of Commerce and

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Labor to furnish "the necessary affidavit." (Gov. Br., p. 47). Assistant Attorney General Milton D. Purdy was Chairman of the three-man Commission on Naturalization and was one of the two commissioners who approved the draft statute which led to the Act of 1906 (H. R. Doc. 46, 59th Cong., 1st Sess.).* The Attorney General's opinion to another cabinet officer, on a matter with which his Department had been familiar from the inception, cannot be dismissed as hasty and ill-considered.

A contemporaneous construction of a statute by the officer charged with its enforcement is entitled to great weight. *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378 (1931); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315 (1933). See also, dissenting opinion of Reed, J., in *Bindczyck* v. *Finucane*, 342 U. S. at page 97.

The Attorney General's opinion was cited to support the conclusion that the affidavit was a procedural requirement in an early treatise by a recognized authority on the statute. Van Dyne, *A Treatise on the Law of Naturalization of the United States* 138 (Washington, 1907).

The same interpretation was enforced by the Court of Appeals for the District of Columbia in *Cohen* v. *United States*, 38 App. D. C. 123 (1912). There a defendant had demurred to the complaint, for lack of the affidavit. The court held that the affidavit was "a condition precedent to the exercising of the power conferred" and stated:

> "Congress was not unmindful of the value of a certificate of citizenship, and, in providing the remedy,

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* Mr. Purdy apparently had an active role in the drafting of the the final bill. At one point in the debate a number of technical questions were raised concerning Section 13 of the Committee bill which authorized United States attorneys to appeal from naturalization orders to the circuit courts of appeal. The floor manager of the bill stated that the Assistant Attorney General on the Commission "had in charge" this section. (40 Cong. Rec. 7785)

Supreme Court of the United States

OCTOBER TERM 1955

No. 213

UNITED STATES OF AMERICA,

Petitioner,

v.

ETTORE ZUCCA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR RESPONDENT

Question Presented

May the United States institute proceedings to set aside a final decree granting citizenship without filing an affidavit showing good cause?

Statement

A few facts should be added to those set forth in the Government's brief (pp. 3-5).

Although the complaint sets forth specifically the written documents in which respondent is alleged to have failed to disclose membership in the Communist Party and affiliated organizations (Gov. Br., p. 4), it does not set forth the detailed circumstances which are alleged to have made these documents false.

The complaint charges respondent with having been "a member of the Communist Party of the United States, including the Workers Communist Party and other organizations affiliated with or controlled by the Communist Party of the United States from 1925 to 1947" (R. 3). None of the "other organizations" are specified nor is the manner in which they were "affiliated" or "controlled".

The complaint also states generally that the respondent advocated and participated in the unlawful activities of the organizations described (R. 5), but does not identify any acts of participation. The complaint alleges that respondent did not have the proper intent to qualify for citizenship in various respects (R. 4-5), but does not specify any acts on his part to establish his true state of mind.

The complaint also alleges that "the defendant did not disclose that he was not in a position to establish that he was a person of good moral character during the period required by law, having, among other things, made false statements under oath in his petition for naturalization, as more specifically set forth hereinabove" (R. 4). The "other things" which prevented the defendant from establishing a good moral character are not specified.

The affidavit of verification, by George C. Mantzoros, Assistant United States Attorney, asserted that the complaint was true of his own knowledge, except as to matters alleged on information and belief (R. 6). No part of the complaint is alleged on information and belief (R. 2-6), very likely an inadvertence. When respondent subsequently sought to take depositions of Mantzoros and others, to ascertain the basis for the charges against him, he was met with an affidavit by Mantzoros denying any knowledge and opposing the taking of such depositions,

on the ground that when he verified the complaint he had no personal knowledge of the facts, was not a prospective witness, and had no information except what was obtained from files turned over to him for use in the preparation of the complaint (R. 8).

The Opinion Below

The opinion of Judge Palmieri in the District Court held that the failure of the Government to file an affidavit of good cause deprived the respondent of a protection which Congress had specifically accorded him by Section 340 of the Immigration and Nationality Act of 1952 (8 U. S. C. Sec. 1451). He held that the Act provided an exclusive procedure for denaturalizations, and that the power of United States attorneys to institute civil denaturalization actions was derived from and limited by the Act.

The Court reviewed in detail the history and purpose of the first comprehensive denaturalization statute in 1906, and the contemporary construction of that Act by the then Attorney General (R. 13-14, 16-18). The Court concluded that Congress intended to require that the United States Attorney be furnished with an affidavit of good cause before he could institute proceedings to set aside a final order granting citizenship. The decision was reached after consideration of most of the decisions cited by the Government here, and on the basis of a more thorough analysis of the statute and its legislative history (R. 12-19) than any other case on the subject.

The Court of Appeals for the Second Circuit recognized the thoroughness of Judge Palmieri's analysis and the soundness of his reasoning by unanimously affirming on his opinion (R. 24).

> coupled therewith the condition that an affidavit should be presented to the district attorney, stating the facts necessary to the maintenance of the suit." (p. 126)

In the first case which this Court decided upholding the application of the 1906 Act to certificates of naturalization issued before that date, the Court treated a showing of good cause as essential to the action. In 1912 this Court stated of the Act:

> "It merely provides that, *on good cause shown*, the question whether one who claims the privilege of citizenship under the certificate of a court has procured that certificate through fraud or other illegal contrivance, shall be examined and determined in orderly judicial proceedings."
>
> *Johannessen* v. *United States*, 225 U. S. 227, 242 (1912). (Italics added.)

Although the remark may be "tangential" (Gov. Br., p. 40), it does not lead in the direction of the Government's present argument.

As far as we can determine from the reported cases, the administrative practice initiated by the Attorney General's ruling was followed generally until at least 1940, when the Court of Appeals for the Ninth Circuit announced the opinion in *Schwinn* v. *United States*, 112 F. (2d) 74. Meanwhile, two other Circuit Courts of Appeals had asserted the necessity of the affidavit. In *United States* v. *Salomon*, 231 Fed. 928 (1916), the Fifth Circuit stated:

> "The district attorneys are authorized to institute the proceedings only 'upon affidavit showing good cause therefor' " (p. 929).

The issue there was not the necessity of the affidavit, but the sufficiency of its allegations, the Court holding that no

actionable illegality was shown where the only ground for cancellation appearing from the affidavit was the failure to post notice of the pendency of the petition for naturalization for the required ninety day period. The *Salomon* case was followed in *United States* v. *Richmond*, 17 F. (2d) 28 (3d Cir., 1927). This was a test case involving one of several hundred persons who had been naturalized by the Federal Court for the Eastern District of Pennsylvania. The proceeding to denaturalize was brought eight months later, on the ground that the witnesses had testified only before the Clerk, the Judge being absent in another part of the courthouse. The proceeding was dismissed because the affidavit showed no sufficient ground for relief. See also *Turlej* v. *United States*, 31 F. 2d 696 (8th Cir., 1929) involving the sufficiency of the affidavit "upon which the action is predicated" (p. 697).

Subsequently, in *United States* v. *Hartmann*, 2 F. R. D. 477 (E. D. Pa. 1942), the court described the filing of the affidavit as one "of the material facts averred in the complaint."

Neither the *Schwinn* case, nor the earlier cases which the Government cites as denying the necessity of an affidavit, involved complaints which were filed without supporting affidavits (except the *Knight* case, *infra*).

In the *Schwinn* case the complaint alleged that an affidavit of good cause had been furnished (see Petition for Certiorari, p. 4, n. 1), but no proof concerning the affidavit was offered at the trial.

An affidavit had also been furnished in *United States* v. *Leles*, 227 Fed. 189 (N. D. Cal., 1915) (Gov. Br., pp. 12, 18, 33, 38), which involved the sufficiency of the allegations in the affidavit concerning failure to examine the supporting witnesses in open court at the time of the naturalization. Although no affidavit was furnished in *United States* v. *Knight*, 291 Fed. 129 (D. Mont., 1923) (Gov. Br., pp. 18, 33,

37), which was unsuccessful though undefended, the United States attorney was in possession of a consular certificate.

The Court in the *Schwinn* case adopted the interpretation that Section 15 of the Act of 1906 was "inclusive not exclusive." This apparently meant that there was a general power in the United States Attorney to institute denaturalization proceedings without the specific authority of this section, a view which this Court rejected in *Bindczyck*.

There is a serious flaw in the Government's argument that this Court, in affirming the *Schwinn* case on other grounds (311 U. S. 616, 1940), must have assumed that an affidavit of good cause is not required (Br., p. 35). Since the *Schwinn* complaint recited the existence of such an affidavit, and the defendant had proceeded to trial without raising this objection, there was no jurisdictional issue involved. In the instant case the Court did not treat the affidavit as jurisdictional, for it retained jurisdiction and allowed the Government time in which to file the affidavit (R. 19, 20).

In *United States* v. *Schuchhardt*, 48 F. Supp. 876 (N. D. Ind., 1943) (Gov. Br., pp. 18, 33), after a motion was made because of the absence of a supporting affidavit, the United States attorney furnished defense counsel with a copy of an affidavit by a special agent of the Federal Bureau of Investigation (p. 877). The Court's statement that the affidavit was not a condition precedent was merely dictum, and not necessary to a decision on the other motions which were before the court at the time.

The continuing practice of furnishing affidavits of good cause is illustrated in *Schneiderman* v. *United States*, 320 U. S. 118 (1943), where the complaint set forth that there was attached an affidavit as "required by the provisions of Section 15 of the aforesaid Act of Congress of June 29, 1906" (Trans. of Rec., Vol. I, p. 3). See also the Court's reference to the affidavit at 320 U. S. 159 n. 54.

The authority of the *Schwinn* case was further undermined in *Bindczyck* v. *Finucane*, 342 U. S. 76 (1951), although it was not expressly referred to. In dealing with the question whether a state court could vacate a decree of naturalization, during the term it was issued, without compliance with Section 340, the court held that the provisions of Section 340 were the exclusive method for denaturalizing and stated:

> ". . . we cannot escape the conclusion that in its detailed provisions for revoking a naturalization because of fraud or illegal procurement not appearing on the face of the record, Congress formulated a self-contained, exclusive procedure. With a view to protecting the Government against fraud while safeguarding citizenship from abrogation except by a clearly defined procedure, Congress insisted on the detailed, explicit provisions of § 15." (p. 83)
>
> ". . . if citizenship was granted, it was to be proof against attacks for fraud or illegal procurement based on evidence outside the record, except through the proceedings prescribed in § 15. The congressional scheme, providing carefully for the representation of the Government's interest before the grant of citizenship and a detailed, safeguarded procedure for attacking the decree on evidence of fraud outside the record, covers the whole ground. Every national interest is thereby protected." (p. 84)

The same court which decided the *Schwinn* case, later followed *Bindczyck* in holding that the notice provisions of Section 340 were mandatory because of the exclusive character of that statute. *Stenerman* v. *Brownell*, 204 F. (2d) 336, 340 (9th Cir., 1953). See also: *United States ex rel. Volpe* v. *Jordan*, 161 F. 2d 390 (7th Cir., 1947).

Almost all the cases cited by the Government in support of its present position (Br., p. 18) were decided in 1954

and 1955. We believe that they do not deserve great weight in determining the meaning of the 1906 statute or the present Section 340. In fact, at least one court felt that the reasoning of the *Schwinn* decision had been repudiated in the *Bindczyck* case, but felt obliged to follow the *Schwinn* decision until it was specifically reversed by this Court. *United States* v. *Lustig*, 110 F. Supp. 806 (S. D. N. Y. 1953).

The recent cases which the Government cites (Br., p. 18) are all district court cases except *United States* v. *Tuteur*, 215 F. 2d 415 (7th Cir., 1954). The *Tuteur* decision was dictum, since the Court reversed the summary judgment granted by the District Court, and need not have considered the necessity of an affidavit. The Court simply cited the *Schwinn* case, without reviewing the history of the statute or the effect of the *Bindczyck* case.

None of the cases which are cited by the Government analyzes the statute or the legislative history as fully as did Judge Palmieri below.

The requirement of an affidavit is not a mere technicality. Serious consequences fall upon a naturalized citizen from the mere commencement of denaturalization proceedings. The attack on his status becomes a matter of public record, open to use by his union adversaries or business competitors. He must submit to elaborate pretrial examination into his political beliefs and his moral character, unless he is in a position to claim the privlege against self-incrimination. Where broad issues are involved, such as whether particular organizations are "affiliated with or controlled by the Communist Party", a defendant may be forced to great expense to hire counsel and investigators. The general respect which was given to the requirement of an affidavit by courts and administrative officers at the time the statute was enacted, and for decades thereafter, shows that Congress recognized the importance of citizenship and intended that a person once

admitted to American citizenship should not be subject to legal proceedings to defend his citizenship without a preliminary showing of good cause.

POINT III

The *Schwinn* decision was not adopted by Congress in subsequent reenactments of the Naturalization Act.

At the time the Nationality Act of 1940 was adopted the weight of authority regarded the affidavit showing good cause as a necessary prerequisite for instituting denaturalization proceedings. Besides the contemporaneous construction of the statute by Attorney General Bonaparte (*supra*, p. 14) and the statement of this Court in *Johannessen* v. *United States* (*supra*, p. 16),* there were decisions by courts of appeal in three circuits approving judgments for defendants because of the Government's failure to file a sufficient affidavit. *Cohen* v. *United States*, 38 App. D. C. 123 (D. C. Cir., 1912); *United States* v. *Salomon*, 231 Fed. 928 (5th Cir., 1916); *United States* v. *Richmond*, 17 F. (2d) 28 (3d Cir., 1927). As against this, there were contrary decisions in one circuit. *Schwinn* v. *United States*, 112 Fed. (2d) 74 (9th Cir., 1940); *United States* v. *Knight*, 291 Fed. 129 (D. Mont., 1923), aff'd 299 Fed. 571 (1924); *United States* v. *Leles*, 227 Fed. 189 (N. D. Cal., 1915). Moreover, none of the contrary cases in the Ninth Circuit involved a square holding (see pp. 17-18, *supra*).

At the time of the 1940 reenactment, therefore, three out of four circuits dealing with the question had held that an affidavit was mandatory, and there were similar statements by this Court and the Attorney General of the United States.

When the denaturalization provision was reenacted in the Immigration and Nationality Act of 1952 the conflict

* An affidavit of the defendant was made part of the Government's petition (225 U. S., at p. 33).

in interpretation had still not been resolved by this Court. However, there were clear indications that the *Schwinn* case was not a reliable precedent. The complaint in so celebrated a case as *Schneiderman* v. *United States*, 320 U. S. 118 (1943), had attached an affidavit (see p. 18, *supra*), and United States attorneys continued to file affidavits in a number of cases (see p. 23, *infra*). There were only two decisions in district court which followed the *Schwinn* case (*e. g., United States* v. *Schuchhardt*, 48 Fed. Supp. 876, N. D. Ind. 1943; *United States* v. *Favorito*, 7 F. R. D. 152, N. D. Ohio, 1945). More recently this Court in *Bindczyck* v. *Finucane*, 342 U. S. 76 (1951), had repudiated the reasoning of the *Schwinn* case by its holding that Section 15 of the Act of 1906 was intended to provide an exclusive procedure in denaturalization cases.

The hearings, reports and debates in connection with the 1952 Act do not indicate that the difference in interpretation of the affidavit provision was called to the attention of Congress. Although there is a considerable discussion of the judicial interpretations of the Nationality Act in the Senate Judiciary Committee report of its investigation of the immigration system (S. Rept. 1515, 81st Cong., 2d Sess.), there is no mention of any decision relied upon by the Government. There are, however, two references (pp. 761, 765) to *United States* v. *Richmond*, 17 F. (2d) 28 (3rd Cir., 1927), which held that the affidavit was mandatory.

Furthermore there were indications that Congress regarded Section 15 (now 340) as a grant of power and not as a method of inducing United States attorneys to act. Congress chose to amend that section when it added additional grounds for revocation of citizenship in the Immigration and Nationality Act of 1952. The House Judiciary Committee Report on the change stated:

> "One of the major changes in the existing nationality law provided by the bill is contained in

Section 340 which authorizes judicial revocation of naturalization. Under the provisions of Section 338 of the Nationality Act of 1940, revocation is possible where the naturalization was obtained by fraud or procured illegally.

"The bill changed the basis for judicial revocation of naturalization from fraud and illegal procurement to procurement by concealment of a material fact or by wilful misrepresentation." (H. R. Rep. 1365, 82nd Cong., 2nd Sess., p. 23)

Congress apparently specifically considered the *Bindczyck* case. Section 340(j) of the Act of 1952 appears to be designed to abrogate the rule that a State court could not reopen an original naturalization proceeding under local rules of practice. However, the basic rationale of the *Bindczyck* case, that Section 340 prescribes and defines the denaturalization power and establishes the procedural conditions for its exercise, is not challenged as respects independent proceedings.

The administrative practice with respect to furnishing affidavits has not been consistent (Petition for Certiorari, p. 8). The opinions in a number of cases after 1940 indicate that affidavits were filed. *United States* v. *Hartmann*, 2 F. D. R. 477 (E. D. Pa., 1942); *Zurini* v. *United States*, 189 F. 2d 722 (8th Cir., 1951); *United States* v. *Kaplan*, unreported, D. Conn. Civ. Action 3509, April 29, 1952). Even after the Act of 1952, affidavits were filed. See, *e. g.*, *United States* v. *Matles-Friedman*, 115 F. Supp. 261, (E. D. N. Y., 1953); *United States* v. *Brown*, unreported, E. D. Mich. Civ. No. 12628, Feb. 15, 1955. The rarity of reported cases in which no affidavits were furnished prior to 1952 points to the belief that affidavits were furnished in a majority of instances until recent years.

In 1954 a brief was filed in the Court of Appeals for the Second Circuit by the United States Attorney for the

Northern District of New York stating as follows:

> "Although revocation proceedings are instituted by United States Attorneys, such actions must be based 'upon affidavit showing good cause therefor'. United States Attorneys do not conduct investigations and the 'good cause' must be supplied by some other agency." (*Application of Barnes*, 219 F. (2d) 137, Brief filed April 13, 1954.)*

Evidence of clear administrative recognition of the necessity for an affidavit of good cause is found in a case presently pending in this Court (*United States* v. *Minker*, October Term, 1955, No. 35). The petition in that case presented the question whether an immigration officer may subpoena a naturalized citizen "in the course of an administrative investigation to determine whether good cause exists for the institution of denaturalization proceedings" (p. 2). The brief on the merits, although doubtless prepared with knowledge of its interrelation to the present case, recognizes that a denaturalization proceeding should be preceded by an ascertainment whether "good cause" exists. The practice, as described in the brief, is for the District Director of Immigration and Naturalization to authorize an investigation if information submitted to the Service indicates a *prima facie* showing that grounds for revocation exists. Following a full field examination, the District Director reports the facts in writing to the Commissioner, who sends it to General Counsel of the Service for study. There, if sufficient grounds are shown, an "affidavit showing good cause" is prepared and executed, and is forwarded as an aid to the formal judicial proceedings which may be brought

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* This case is pending before this Court on writ of certiorari *sub nom. Falcone* v. *Barnes*, No. 47. See also *Lansky, et al.* v. *Saxoretti*, 220 F. 2d 906 (5th Cir., 1955) pending on petition for certiorari, No. 100.

in the district where the naturalized citizen resides "at the time of bringing suit" (p. 34). The brief describes the Immigration and Naturalization Service as known by Congress to be the investigative arm of the Attorney General "to determine whether there exists the 'good cause' which requires that an action for revocation be brought" (p. 22).

As against these indications of substantial administrative compliance with Attorney General Bonaparte's opinion, there is apparently no instance in which the contrary interpretation was relied on by delivering an "outsider" affidavit to a reluctant United States attorney.

If, therefore, Congress may be said to have approved any construction of the statute by reenactment, the weight of authority indicates that it approved the contemporary interpretation of the Attorney General. In any event, the doctrine of Congressional approval by reenactment gives no support to the Government's argument, in the absence of a single authoritative interpretation which was called to the attention of Congress and expressly dealt with. This Court had before it a similar contention with respect to the Nationality Act of 1940 in *Girouard* v. *United States*, 328 U. S. 61 (1946). In that case it was held that an authoritative construction of the nationality laws adopted in three separate decisions of this Court was not approved by Congress in the 1940 Act despite the fact that the rule of these cases had repeatedly been called to the attention of Congress and many bills designed to overturn that rule had been introduced. See also: *Commissioner* v. *Sternberger's Estate*, 348 U. S. 187, 206 (1955). As was pointed out by the Court in *United States* v. *Candela*, 131 F. Supp. 249 (S. D. N. Y., 1954) "to adopt (the *Schwinn*) decision all Congress need have done is delete six words" (p. 251).

The history of Section 15 demonstrates that if the affidavit showing good cause does not serve the purpose of

protecting naturalized citizens against unfounded proceedings, it serves no purpose. The mere retention of the clause is an indication that the affidavit is regarded as a prerequisite for institution of proceedings.

POINT IV

The legislative history confirms that Congress intended to require an affidavit showing good cause as a necessary preliminary step to the institution of denaturalization proceedings.

The legal background indicates that Congress' purpose in 1906 was to provide a uniform procedure for naturalization and denaturalization.

Under the equity practice before 1906, denaturalization proceedings could be brought in one of two ways. The first way was to apply to the court which had granted the naturalization decree to vacate its judgment and receive additional testimony bearing upon the fitness of the applicant for citizenship. See e. g. *United States* v. *Kornmehl*, 89 Fed. 10 (D. C. N. J., 1898). Such a motion might be based upon fraud, mistake, newly discovered evidence or other ground. It would not be granted *pro forma*, however, and would of necessity be based upon a showing of good cause for going behind the outstanding judgment.

Roughly comparable to such motions were certain ancillary equitable remedies available only in the naturalization court, notably the bill of review.*

A bill of review could not be filed, however, without obtaining leave of the trial court or, if there was an appeal, of the appellate court. *Obear-Nester Glass Co.* v. *Hartford*

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* For a general discussion of the ancient procedures for relief from a judgment or order see Moore's Federal Practice, 1955, Vol. 7, Ch. 60.

Empire Co., 61 F. 2d 31, 34 (8th Cir., 1932). To obtain leave it was necessary to make a preliminary showing of merit.

See e. g. *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U. S. 238, 248 (1944), where this court stated of a petition for leave to file a bill of review:

> "The petition must contain the necessary averments, supported by affidavits or other acceptable evidence;"

Modern analogies to this practice may be found in the Rules of Civil Procedure. Rule 55 (c) provides that the Court may set aside an entry of default "for good cause shown". A judgment after contest may be set aside for fraud on motion pursuant to Rule 60 (b). A motion under Rule 60 (b) would normally be based upon affidavits showing good cause.

There were at least two difficulties to this pre-1906 procedure. One was that many of the fraudulent naturalization proceedings appear to have occurred in certain State courts and involved at least laxness on the part of some court officers. Therefore the forum might not be advantageous. Furthermore there were many vagaries and uncertainties in this procedure in State courts. See: Appendix, *Bindczyck* v. *Finucane*, 342 U. S. at page 88.

An alternative denaturalization procedure before 1906 was to bring an independent action in equity. Such a proceeding would not operate against the judgment, which was in legal fiction unassailable, but against the person. It would require the defendant to surrender his certificate and forbid him from asserting rights under the judgment because he obtained it by fraud upon the court. Cf. Rule 60 (b) of Civil Procedure, which preserves the bill in equity procedure for other kinds of judgments. This highly artificial procedure was, however, sharply restricted in its scope. By 1906 there were growing indications that the independent bill was not a practicable denaturalization procedure.

In *United States* v. *Norsch*, 42 Fed. 417 (E. D. Mo., 1890), the Court stated, *obiter*, that a Federal court could entertain proceeding against a state court judgment obtained by false testimony, but it was held that procedural irregularities in the naturalization court could not thus be inquired into by a proceeding in a different court. The fact that the naturalization court (the St. Louis Court of Criminal Correction) probably had no power to set aside its own order or to entertain a bill of review was thought not to require a different result. In *United States* v. *Gleason*, 78 Fed. 396 (E. D. N. Y., 1897), aff'd *sub nom*, *United States* v. *Gleeson*, 90 Fed 778 (2nd Cir. 1898), it was held that where the judgment was regular on its face, an independent proceeding could not be entertained to set it aside for false testimony. These cases taken together seriously impaired the possibility of independent action and forced the filing of denaturalization proceedings in the very courts which were responsible for the worst abuses. Moreover, even if proceedings could be entertained in the Federal courts, it has never been clear to what extent those courts would entertain proceedings to cancel citizenship for intrinsic fraud such as perjured testimony, without express statutory authority. In *Johannessen* v. *United States*, 225 U. S. 227 (1912), this Court considered the scope of the denaturalization power as it existed prior to the Act of 1906 and left this question open. "The extent of general Federal power to denaturalize was, prior to . . . [1906], a matter of considerable legal controversy." (S. Rep. 1515, 81st Cong. 2d Sess., p. 754.)

Denaturalization proceedings continued to be brought, in spite of these obstacles (see pp. 36-38, *infra*), but there was obviously need to clarify the source of the Court's power.

The predominant intent of Congress in Section 15 of the Act of 1906 was not to stimulate United States attorneys to act (see pp. 36-41, *infra*), but to establish a single

reliable and carefully safeguarded procedure for instituting denaturalization proceedings in the Federal courts which would not be subject to the vagaries of State and Federal rules on reopening judgments. In authorizing this procedure Congress took care to preserve the common requirement of a preliminary showing of good cause.

The requirement of an affidavit was first inserted in the statute as a qualification on the power to denaturalize, and not as a means of forcing the United States attorney to act.

The first draft of the Act of 1906 was prepared by the Commission on Naturalization appointed by President Theodore Roosevelt. This draft provided:

> "Sec. 34. The United States shall have the power to institute proceedings . . . for the purpose of setting aside and canceling the certificate of citizenship. . . ." (H. R. Doc. No. 46, 59th Cong., 1st Sess., App. F., 106).

This draft was revised in the House Committee on Immigration and Naturalization. The bill reported to the House with the Committee's approval provided:

> ". . . the United States shall, *upon affidavit made by any credible person*, have the power to institute proceedings . . . for the purpose of setting aside and canceling the certificate of citizenship. . . ." (H. R. 15442, 59th Cong., 1st Sess., Sec. 17, bill dated Feb. 26, 1906) (Italics added)

The committee reported that under the bill, "Power is given to the United States, upon affidavit of any credible person, to institute proceedings . . ." (H. R. Rep. 1789, 59th Cong., 1st Sess., 5-6)

The argument that the House Committee regarded the affidavit clause as a step in the direction of compelling the United States attorney to act (Gov. Br., p. 28) is based entirely upon hypothesis and ignores language which is unambiguous.

The words "affidavit made by any credible person" added in Committee are similar to the words "affidavit of a credible person" in a bill which had been defeated 35 years prior (93 Cong. Globe 4835). The language of the earlier bill confirms that the Congress did not lack the skill to draft a statute requiring United States attorneys to proceed when it wished to do so. The House Committee draft clearly indicates that whether or not the members were familiar with the earlier bill, they repudiated the idea of private complaints and regarded the affidavit as a limitation on the power of the United States to institute denaturalization proceedings.

It is incorrect that the 1870 bill "died an entirely unrecorded death" in the argument that ensued when Senator Sumner introduced an amendment to naturalize Negroes and orientals. *Roche, Pre-Statutory Denaturalization*, 35 Cornell L. Q. 120, 129 (1949) (quoted in Gov. Br., p. 24). The Sumner amendment was defeated and the Senate bill was voted down by a vote of 33 to 17 (93 Cong. Globe 5123). The overwhelming opposition to the bill stemmed in part from the easy denaturalization procedure it authorized. Senator Schurz described it as making a naturalization paper like "a vial of nitroglycerine in one's pocket that might explode at any moment * * *" (93 Cong. Globe 5118).

It is not necessary, however, to refer to this old bill to obtain an explanation for the reference to an "affidavit made by any credible person." Prior to the 1906 Act the naturalization statutes required that a petitioner prove five years residence by the oath of citizens of the United States

(1878 Revised Statutes, Section 2165). The Act of 1906 elaborated this requirement, providing that the naturalization petition,

> "*be verified by the affidavits of at least two credible witnesses,* who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the State, territory or district in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition, and that they each have personal knowledge that the petitioner is a person of good moral character, and that he is in every way qualified, in their opinion, to be admitted as a citizen of the United States." (Sec. 4, Par. second; Italics added)

This provision was taken without significant change from Section 17 of the draft bill recommended by the Commission on Naturalization (H. Doc. 46, 59th Cong., 1st Sess. pp. 98-99).

The apparent explanation of the reference to an "affidavit made by any credible person" in Section 15 was that the Committee believed that the requirements for verification of a denaturalization petition should be no less strict than those for verification of the naturalization petition. Congress, therefore, required that the Court be furnished with the affidavit of a person having personal knowledge of the facts with respect to the defendant's alleged fraud or illegal procurement before it would entertain denaturalization proceedings.

On the House floor the bill was attacked strongly section by section in Committee of the Whole as imposing undue hardships on aliens and naturalized citizens (40 Cong. Rec. 7762-87).

Finally the attacks on Section 13 motivated Mr. Bonynge, the floor manager, to ask that the section be passed over without prejudice and then that the debate be adjourned (40 Cong. Rec. 7787).

When the bill was called up again, a series of moderating amendments were offered by Congressman Bonynge, apparently by agreement with the bill's opponents. He then moved that the Committee be discharged and a vote taken on the amended bill (40 Cong. Rec. 7869).

There were three amendments to Section 15:

1. The venue was restricted to the residence district of the naturalized citizen.*

2. The language "the United States shall . . . have the power" was changed to "it shall be the duty of the United States district attorneys . . ."

3. The phrase "affidavit showing good cause" was substituted for "affidavit made by any credible person" (40 Cong. Rec. 7871, 7874).

The purpose of the venue amendment was explained clearly by Congressman Bonynge, but the only explanation of the other two changes was his statement that United States attorneys already had the power to institute denaturalization proceedings under federal court decisions (40 Cong. Rec. 7874). However, the context of his remarks shows that he did not consider that he was changing the affidavit of good cause from a qualifiying requirement to a mere instrument of compelling action by a reluctant district attorney.

The most reasonable explanation of the change of language from power to duty supports the construction

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* The Government brief is not correct in stating that the favorable venue provision was added before the reference to an affidavit of "any credible person" (p. 28).

adopted below. Since the United States already claimed the power to bring denaturalization proceedings (*supra*, pp. 26-28), the bill as reported might not assure that United States attorneys would follow the procedural requirements of the new section. In form the bill would simply confer additional power subject to compliance with the new procedural restrictions, and United States attorneys might still attempt to proceed under the asserted old powers and procedures. To assure compliance with the new procedure in all cases, the statute was amended to read, "* * * it shall be the duty of the United States attorneys," etc. What had formerly been a qualification on the grant of power (i. e. the furnishing of an affidavit) now was expressed as a duty of the United States attorney, but the basic intent of the bill was unchanged. Since the bill contemplated that the affidavit would be delivered to the court by the United States attorney and not by an outsider, the words "affidavit made by any credible person" were inappropriate and were changed to "affidavit showing good cause."

It is significant also that the change from words of "power" to "duty" coincided with a change from the Government itself to an agent of the Government. The language of the bill had read, "The United States shall * * * have the power to institute proceedings." The specification that the Government should act through the United States attorney was a step in the direction of clarifying and tightening the wording of the Act. In referring to a particular officer of the Government, it was more natural to use the word "duty" than "power," but the change in language signifies no change in the importance of the affidavit.

The modified language also evidences an intent that the court shall pass upon the sufficiency of the affidavit as showing good cause, since under the abandoned language it might be argued that the unsupported conclusions of

"any credible person" were sufficient. The 1870 proposal for an affidavit of a "credible person" had been criticized in these words:

> "A man who may have been naturalized for any period of time may upon the oath of anyone, however degraded, who only expresses his belief, be called up by an order of the judge, under the suggestion of the District Attorney, and if he fails to appear may be punished by fine and imprisonment!" (Comment by Senator Vickers, 41st Cong. 2d Sess., 93 Cong. Globe 4840).

The requirement that the affidavit show "good cause" apparently was a concession to criticism of this sort.

The Government can not fairly argue that these last minute modifications of wording, passed off by the floor manager as purely technical, represent a sudden major change in the purpose of the provision. Therefore, it seeks to interpret the clear language of the bill reported favorably by the House Committee, i. e. "The United States shall, upon affidavit made by any credible person, have the power * * *" as a "gingerly and reluctant" step toward private complaints (Br., p. 28).

The Brief then goes further and hypothesizes that the change to language of duty was made by Mr. Howells on pressure of supporters of private denaturalization, like Representatives Jenkins, Hayes, and Waldo (Br., pp. 28-29). Actually the change was not made by Mr. Howells. It was made in an amendment on the floor moved by Mr. Bonynge in response to the pressure of opponents of the bill (*supra*, p. 32). The Senate Committee, in reporting the bill in its amended form, reprinted without comment the description of the bill as a conferral of power upon the filing of an affidavit (S. Rep. 4373, 59th Cong., 1st Sess., 4).

The words "probable cause" had appeared in at least one naturalization case before that date. *In re Coleman*, 15 Blatchf. 406, 6 Fed. Cas. No. 2980 (C. C. S. D. N. Y., 1879) involved a habeas corpus proceeding to review the arrest of a naturalized citizen under a warrant charging him with illegally attempting to vote in reliance on a certificate of citizenship which he knew to be invalid. The petitioner was one of some 18,000 who had been naturalized in the Superior Court of New York in October 1868. This prosecution apparently was a test case brought as a criminal matter to escape the jurisdiction of the State Court. In view of its connection with the notorious naturalization scandal of 1868, it is logical to assume that the decision attracted wide attention. Circuit Judge Blatchford, in a long opinion, treated the Sixth Amendment as entitling the petitioner to notice of the nature and cause of his charge, described the Superior Court action as an adequate record of naturalization, and stated concerning the affidavit in support of the warrant of arrest "No 'probable cause' was set forth in the affidavit" (6 Fed. Cas. at p. 54).

Whether or not Congress had the *Coleman* case in mind when it enacted the statute of 1906, it constitutes judicial recognition of the importance of an affidavit of probable cause in a closely analagous situation.

Judge Palmieri, in the District Court opinion in this case, summarized the effect of the floor action on the provisions of Section 15 of the Act of 1906 by saying:

> "The fact that Congress inserted these requirements for the protection of naturalized citizens in the 1906 Act is inconsistent with the Government's position. It indicates that in enacting Section 15 of that Act Congress did intend to limit the theretofore exercised power of United States Attorneys to institute civil denaturalization actions" (R. 14).

There is no showing that United States attorneys were lax in bringing denaturalization actions before 1906.

We have discovered no suggestion whatever throughout the voluminous debates and reports on naturalization legislation, that the United States attorneys were lax in bringing denaturalization proceedings. The debates on naturalization matters were often heated. It is unreasonable to assume that a provision intended to force United States attorneys to act on citizen complaint could be enacted without a single expression criticizing United States attorneys for laxness. Nor is it likely that the well-established rule against private complaints (see Gov. Br., p. 24) would be overturned without a word of explanation or protest. Such evidence as is available indicates, in fact, that Congress was concerned with excessive zeal on the part of the United States attorneys. As an historical matter, naturalization legislation was sought primarily by Republicans because loose naturalizations on the eve of elections were thought to benefit primarily the big-city machines of the Democratic Party. A strong impetus toward legislation began with the election of 1868, in which it was claimed that the State of New York was lost to the Republican Party through the naturalization in State courts of tens of thousand of aliens in the City of New York. See: Roche, *Pre-statutory Denaturalization*, 35 Cornell L. Q. 120, 126-7 (1949). At this time and throughout most of the period until 1906 the Republican party controlled Federal appointments and the United States attorneys were zealous in denaturalization measures. According to one commentator, about 2,000 persons holding 1868 certificates were denaturalized in New York City in 1878, many through illegal seizure of certificates by the United States attorney. *Id.* pp. 131-132. It appears that that officer contended that *all* the 1868 certificates of citizenship were invalid and attempted to prevent the

holders of such certificates from voting in the 1878 elections by delivering an "official" warning to them at the registration places that they "could avoid arrest and prosecution" by surrendering their certificates by November 1. See: *In re Coleman*, 15 Blatchf. 406, 410; 6 Fed. Cas. No. 2,980 (S. D. N. Y., 1879).

Statements from members of the Executive Department confirm the continued activity in denaturalization. President Benjamin Harrison stated in his Second Annual Message in 1890 that:

> "The vacation by judicial decree of fraudulent certificates of naturalization, upon bills in equity filed by the Attorney General in the circuit court of the United States, is a new application of the familiar equity jurisdiction. Over one hundred such decrees have been taken during the years. * * *" (Richardson, *Messages and Papers of the Presidents*, Vol. 9, p. 116)

Revocation proceedings were often commenced for political expediency. Upon occasion naturalized persons found to be members of the wrong party were promptly denaturalized. The Report of Special Examiner Van Deusen in 1903, although primarily concerned with naturalization frauds, stated the following with respect to irregular denaturalizations:

> "In another case, a judge entered an order revoking certificates of citizenship granted to seven aliens by him, under the impression that they had been sent by his political organization, but were afterwards repudiated by that organization. The order recited, as a reason for the revocation, the fact that the fees had not been paid." (1903 Rep. Atty. Gen. 394)

The United States District Attorney in California attempted to revoke nine citizenship orders in an *ex parte*

proceeding on oral motion, purporting to be made in the course of the original proceedings, some three years after the orders admitting to citizenship. See, *Tinn* v. *United States District Attorney*, 148 Cal. 773, 84 P. 152 (1906). See also 40 Cong. Rec. 7045, where it was stated that 204 certificates were turned in within thirty days when the United States District Attorney in San Francisco announced that he would not prosecute holders of fraudulent certificates who surrendered their certificates. See, *Bindczyck* v. *Finucane*, 342 U. S. 76, n. p. 82.

The immediate impetus for the studies culminating in the Act of 1906 was the St. Louis naturalization frauds of 1902. A description of some of the naturalization abuses which then occurred appears in *Dolan* v. *United States*, 133 Fed. 440 (8th Cir., 1904). Here again it appeared that the frauds implicated Democratic Party workers and involved State court naturalization practices. The United States Attorney was vigorous in prosecuting offenders through a grand jury investigation commencing in January of 1903.

In a little over two years time between 1903 and 1905, United States district attorneys succeeded in cancelling 1916 certificates of citizenship in civil proceedings and obtained 865 criminal convictions (H. R. Rep. 1789, 59 Cong., 1st Sess. 2). It appears that many of the civil proceedings were conducted in the City of New York despite the ruling in *United States* v. *Gleason*, 78 Fed. 396, that perjury was not a ground for revocation of citizenship. The methods that were used remain somewhat of a mystery, because of the adverse opinions in reported cases and the absence of court records of these proceedings. See Roche, *Pre-Statutory Denaturalization*, 35 Cornell L. Q. 120, 132.

The Government (Br., p. 21) mentions, as evidence that United States attorneys might be indisposed to vigorous

action, a complaint by the Commission on Naturalization that "the requirement for supervision by federal and state prosecuting attorneys would work irregularly." Read in its proper context, the Commission is shown to have been expressing concern not about *federal* attorneys, but about state prosecuting attorneys, in state court proceedings; moreover, it was referring to *naturalization* proceedings (and not denaturalization proceeding). The portion of the report quoted by the Government (H. Doc. 46, 59th Cong., 1st Sess. 27) referred to a bill introduced in the 52nd Congress, First Session (H. R. No. 12), providing that when an alien's petition for naturalization was filed, the Clerk of the Court was to report the fact to the United States attorney or the state's attorney as the case might be, to appear and defend the United States. The Commission was arguing for national supervision of naturalization. Its remarks have no bearing on any supposed unwillingness of United States attorneys to bring denaturalization proceedings.

At various times in the House debate, there was discussion of registration frauds (40 Cong. Rec. 3647), false certification of expenses by judges (Id., 3648), and sale of forged naturalization certificates by United States consuls (Id., 3653). The report of the Commission on Naturalization refers to "the shameless influences which have brought so many State courts into disrepute so far as the matter of conferring citizenship is concerned", and to many State judges as permitting the law "to be degraded into an instrument of fraud and political corruption" (H. Doc. 46, 59th Cong., 1st Sess., pp. 19-20, 21). Furthermore, there were suggestions that partisan United States attorneys might take appeals *in naturalization cases* to delay qualification of the petitioners for voting (40 Cong. Rec. 7767-68, 7786). Despite the freedom of the debate there appears no suggestion that it was necessary to force partisan or reluctant United States attorneys to bring denaturalization proceedings.

The only other evidence which the Government cites concerning "the suspicion as to United States attorneys" (Br., p. 21) relates to the section concerning appeals from an original grant of citizenship. The reference to an astute district attorney taking an appeal in naturalization cases in order to affect the election in favor of his side, read in its true context, follows a statement by Representative Mann in support of a proposed amendment to limit the 90 day waiting period before final action in naturalization cases to a period of 30 days. He feared undue diligence, rather than laxity. Representative Mann stated: "I think the observation and experience of almost every Member of the House is that where it is made a duty of the Government, or the Government is given a right to do a thing, it is the duty, and the Government does it." 40 Cong. Rec. 7767.

Against the background of partisan zeal of United States attorneys in confiscating naturalization certificates without judicial proceedings, and seeking to revoke citizenship by *ex parte* applications (pp. 36-38, *supra*), the Court's language in *Bindczyck* has direct relevance:

> "But Congress was not content to devise measures against fraud in procuring naturalizations only. In § 15 of the Act of 1906 it formulated a *carefully safeguarded method for denaturalization.* Though the principal criticism leading to the enactment concerned the evils inherent in widely diverse naturalization procedures, experience was not wanting of the *dangers and hardships attendant on haphazard denaturalization.*" (pp. 81-2; Italics added.)

This was the matter with which Congress was concerned: It knew that, "[a]liens coming to this country . . . as a general rule, are without money to spend . . . In the main, they are ignorant of our language and of our laws . . ." (40 Cong. Rec. 7772). It wanted to protect such persons

against default and consent judgments obtained wholesale without proper notice and in inconvenient forums. See, dissenting opinion of Justice Reed in *Bindczyck* v. *Finucane*, 342 U. S. at page 94. The unusual notice and venue provisions are intended to make it easier for such persons to appear and defend themselves. The affidavit requirement is intended to assure that denaturalization proceedings will not be commenced upon suspicion and surmise and to assure that whether or not the defendant appears the court will be presented with sworn testimony sufficient to justify revocation of citizenship. The affidavit, notice, and venue provisions are all parts of a single system of safeguards which Congress insisted upon as a condition to the broad grant of authority it conferred.

Section 15 did not represent a "compromise" with "demands" for bills permitting private citizens to institute denaturalization proceedings.

The Government asserts that there was a widespread "demand" for legislation to permit denaturalizations at the suit of private citizens (Br., p. 27), and that the section, as enacted, represented a "compromise" with these bills (Br., p. 20).

A careful study has been made of the legislative history of the 1906, 1940 and 1952 acts, the reports, opinions, and correspondence of the Attorney General, the annual messages of the Presidents of the United States, and treatises and articles. Professor Oscar Handlin of the Department of History of Harvard University, as a consultant to respondent's counsel, has also examined the correspondence of President Theodore Roosevelt, the reports of the Commissioners of Immigration, newspapers and occasional papers of some of the members of the House of Representatives and the Senate. No trace has been found of any "demand" to give citizens a means of forcing district attorneys to exercise their powers.

The efforts to obtain legislation in 1870 were inspired by the mass naturalizations in New York City in 1868, which we have seen were vigorously attacked by the United States Attorney. The House bill as originally reported contained no provision for revocation of citizenship and simply imposed criminal penalties upon conviction of specified offenses against the naturalization laws (H. R. 2201, 41st Cong., 2d Sess., 93 Cong., Globe 4366). The Senate Judiciary Committee amended the bill, and substituted a completely new measure with provisions for revocation of citizenship. The bill was not enacted. The discussion on the floor of the Senate centered on charges that it was an unfair Republican Party measure, intended to maintain the Republican majority by making naturalization difficult and denaturalization easy (93 Cong., Globe 4836-8). The only comments with respect to the denaturalization provision were adverse. See the statements of Senator Vickers and Senator Schurz, *supra*, pp. 30, 34.

It was not the laxity of the Executive Department which was impeding denaturalizations; it was the solicitude of Congress for the interests of the thousands of naturalized citizens who held certificates which might be subject to attack.

Messages of the Presidents continued to urge action for denaturalization. For instance, President Grant in 1876, referred to the need for more effective procedural remedies against naturalization frauds:

> "Such a fraud being discovered, however, there is no practical means within the control of the Government by which the record of naturalization can be vacated;— The feeling became so great and of such frequent occurrence that I cannot too earnestly recommend that some effective measures be adopted to provide a proper remedy and means for the vacating of any record thus fraudulently made; * * *" *Eighth Annual Message*, 1876; Richardson, *Messages and Papers of the Presidents*.

See also:

Ulysses S. Grant, *Sixth Annual Message*, 1874; *Seventh Annual Message*, 1875;
Chester A. Arthur, *Fourth Annual Message*, 1884;
Grover Cleveland, *First Annual Message*, 1885;
Theodore Roosevelt, *Third Annual Message*, 1903; *Fourth Annual Message*, 1904; *Fifth Annual Message*, 1905.

There is no support for the statement in the Government's brief that "more immediately prior to the instant 1906 enactment, interest in the problem revived and a marked demand developed for a means of assuring denaturalization proceedings when the United States attorney might be indifferent" (p. 24). Such a demand did not exist, for the United States attorneys were acting to revoke citizenship, but in proceedings of uncertain validity and not surrounded by safeguards commensurate with the importance of the loss of right involved.

The Government, in its brief (p. 25), concedes that the Commission on Naturalization did not participate "in the demand for a means of forcing denaturalization actions". In fact, when H. R. 15442 was reported to the House it was reported that the bill "is in a large measure based upon the drafts of the bill prepared by that Commission", 40 Cong. Rec. 3640.

An affidavit of probable cause is not comparable to a provision for action by individual citizens. The Committee on Immigration and Naturalization specifically considered the bills authorizing denaturalization "on petition • • • by any citizen" (H. R. 274, 8424, 10837), and rejected any such reference.

The legislative history shows a Congressional purpose to safeguard the rights of defendants in denaturalization proceedings, and that the affidavit showing good cause is a procedural safeguard, comparable to the requirements of venue in the district of residence and notice of 60 days.

POINT V

The affidavit showing good cause constitutes a reasonable precaution for the protection of naturalized citizens.

The decision below will not place any serious burden on the United States attorneys. They are presently furnished, in ordinary course, with affidavits prepared by the Immigration and Naturalization Service, showing whether good cause for denaturalization exists (*supra*, pp. 24-25). The very preparation of these affidavits represents a recognition of the meaning of the provision that denaturalization action shall be brought "upon affidavit showing good cause".

The discovery provisions of the Federal Rules of Civil Procedure are applicable to denaturalization proceedings. Disclosure of the Government's case must be made before trial in any event, and the decision below merely requires it to be made at the outset. In this manner it permits the defendant, before facing a full trial of the issues, to obtain a preliminary determination whether the evidence disclosed by the affidavits on which the proceeding is based constitutes adequate ground for denaturalization if proved. This procedure will protect naturalized citizens from the harassment and expense of litigation in cases where an adequate preliminary showing cannot be made. Serious harm can result to a union officer, a business man, a member of a profession, or indeed, any citizen, from official charges of fraud. This harm will not always be corrected by a later acquittal.

United States citizenship carries with it many personal rights of a higher standing than ordinary economic interests. Few benefits within the power of government are more cherished and few alter so fundamentally the whole way of life of the recipient. "New relations and new in-

terests flow, once citizenship has been granted". *Baumgartner* v. *United States*, 322 U. S. 655, 675 (1944). Revocation of citizenship and deportation are penalties for which there is no parallel in civil proceedings. This Court has analogized such proceedings to criminal cases as regards the burden of proof. *Schneiderman* v. *United States*, 320 U. S. 118 (1943), *Gonzales* v. *Landon*, — U. S. —, 100 L. ed. (Advance p. 136). Denaturalization may result in the loss "of all that makes life worth living * * * the fate of a human being is at stake * * *" (*Knauer* v. *United States*, 328 U. S. 654, 659 (1946). Mr. Justice Rutledge described a denaturalization proceeding as a "harrowing process" (Concurring opinion in *Schneiderman* v. *United States*, 320 U. S. at 166-67).

What is more logical than to assume that Congress wished to assure that denaturalization proceedings could be maintained only if there was some procedural equivalent of arraignment and indictment? The furnishing of affidavits is a simple matter for the Government if it has an adequate basis for commencing proceedings.

The affidavit showing good cause does not involve any duplication of procedure as the Government asserts (Br., pp. 16-17). The purpose is not to obtain a sworn statement of bona fides by the prosecuting officer, but to bring the provable facts before the court for a preliminary determination of their sufficiency. A complaint like this one does not, by virtue of a verification clause, constitute the equivalent of the affidavit. The complaint here lacks in details which such an affidavit might supply. Congress could not have deemed sufficient an affidavit stating that the defendant was a member of the Communist Party and other organizations controlled by or affiliated with it. This is a mere conclusion from undisclosed evidence. An affidavit should state the names of these organizations and the overt acts upon which the Government relies to prove defendant's membership. Cf. *United States* v. *Remington*, 191 F. (2d) 246, 250 (2nd Cir., 1951) cert. den. 343 U. S.

907 (1952). Similarly Congress could not have intended that the courts be required to accept the second-hand statements of investigators where first hand testimony is available. (*Cf. United States* v. *Sherrock*, 276 Fed. 30, D. Mont., 1921). The District Court should be furnished now with the affidavits of those who assert defendant committed fraud and the substance of their testimony against him, and the Court should decide whether good cause is shown for proceeding further.

The affidavit does not present any opportunity for two trials (Cf. Gov. Br., p. 17). Defendant does not claim any right to cross-examine or to call witnesses in his own behalf in determining the sufficiency of the affidavit, any more than he would in a motion addressed to the complaint itself. The requirement that good cause be shown means only that the Government must furnish the Court with sworn statements by persons having personal knowledge of the facts which on their face, unchallenged and unexplained, would justify revocation of citizenship.

This does not involve a meaningless repetition of action. A pervading theory of our Constitution and laws is the checking and balancing of executive power by judicial power. The question here, as often under our laws, is not whether the United States Attorney is acting in good faith, as the Government repeatedly asserts (Br., pp. 2, 5, 9). Rather the question is whether he has complied with procedures insisted upon by Congress to assure that no one occupying his office will cause unjust injury to others. The judicial check here as elsewhere is the mechanism by which the liberty of citizens is preserved.

American citizenship was a precious possession in 1906 as it is today. It is not only most consistent with the statute, its legislative history and its principal judicial interpretations, but it is essential for the protection of citizens, that the provision for an affidavit of good cause be made fully effective as a condition precedent to any action.

CONCLUSION

The order and judgment should be affirmed.

Dated: New York, January 16, 1956.

Respectfully submitted,

ORRIN G. JUDD,
Attorney for Defendant.

MORRIS A. WIRTH,
EARLE K. MOORE,
IRWIN M. ROSENTHAL,
of Counsel.

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Supreme Court of the United States

OCTOBER TERM 1955

No. 213

UNITED STATES OF AMERICA,

Petitioner,

v.

ETTORE ZUCCA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COMMENTS OF RESPONDENT ON SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

ORRIN G. JUDD,
Attorney for Defendant.

EARLE K. MOORE,
of Counsel.

Supreme Court of the United States

OCTOBER TERM 1955.

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ETTORE ZUCCA,

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COMMENTS OF RESPONDENT ON SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

Pursuant to permission given by the Court at the oral argument of the case, respondent submits the following comments on the Supplemental Memorandum for the United States.

The Circular for United States Attorneys Concerning Affidavits in Denaturalization Cases.

Circular No. 3663 of the Department of Justice, which is referred to in the Supplemental Memorandum for the United States, was issued over two years after the passage of the Nationality Act of 1940 (54 Stat. 1137, 1158). Consequently it has no bearing on the issue of reenactment in connection with the 1940 Act, nor on administrative interpretation of the language which had been taken over from the 1906 Act. The section dealing with the affidavit omits the significant early case of *Cohen* v. *United States*, 38

App. D. C. 123 (1912), and the other cases on such affidavits which are cited in Point II of our brief. Moreover, it appears to have been a purely internal memorandum, not available to the public, and not brought to the attention of Congress in connection with the consideration of the Immigration and Nationality Act of 1952.

With respect to the language of Circular No. 3663, and its bearing on the necessity of an affidavit to disclose the factual basis of the complaint against a naturalized citizen, we believe that the portion quoted speaks for itself.

The Number of Denaturalization Proceedings Instituted.

The figures given by the Government with respect to the number of denaturalization proceedings instituted in prior fiscal years include all denaturalization proceedings, whatever the ground for bringing them. We believe that a division between certain major classifications of proceedings may aid the Court in judging the relative burden on the Government of filing affidavits showing good cause, as against the protection which such affidavits afford to the defendant.

The annual reports of the Immigration and Naturalization Service, Department of Justice, for 1952 and 1954, disclose the following figures concerning actual revocations of citizenship:*

	1951	*1952*	*1953*	*1954*
All grounds	279	403	335	165
Establishing permanent residence abroad within 5 years after naturalization	275	384	327	150
Fraud and similar grounds	4	19	8	15

* We have not found any classification of proceedings instituted but over a period of years there appears to be a fairly close correspondence between the totals of proceedings instituted and actual revocations.

The loss of status as a naturalized citizen by establishing permanent residence abroad within five years after naturalization is specially dealt with in Section 340(d) of the 1952 Act (8 U. S. C., Sec. 1451(d)). This section specifically provides that certified statements by diplomatic and consular officers of the United States in the various foreign countries shall be admissible in evidence in all courts in proceedings to revoke the citizenship of naturalized persons who have taken permanent residence abroad. Therefore, the burden of preparing affidavits in such cases is likely to be met by the use of the certificate alone. *United States* v. *Knight*, 291 Fed. 129 (D. C. Mont. 1923); aff'd, 299 Fed. 571 (9th Cir., 1924) was a case where, although there was no affidavit, a consular certificate was submitted (291 Fed. at 131-132), and the opinion dealt with the sufficiency of the certificate to show that the permanent residence abroad began within five years after the date of naturalization. It may be assumed that many of the complaints in cases of permanent residence abroad are served by publication and are undefended, as in the *Knight* case. The Annual Report of the Director of the Administrative Office of the United States Courts for the year 1954 (Table C 8) shows a total of 24 denaturalization trials in all 86 districts.

The 1954 Annual Report for the Immigration and Naturalization Service (p. 44) recites that the number of suits filed in the United States District Courts in 1954 against naturalized persons who were alleged to be Communists at or prior to their naturalization was 31.

Dated: New York, February 1, 1956.

Respectfully submitted,

ORRIN G. JUDD,
Attorney for Respondent.

EARLE K. MOORE,
Of Counsel.